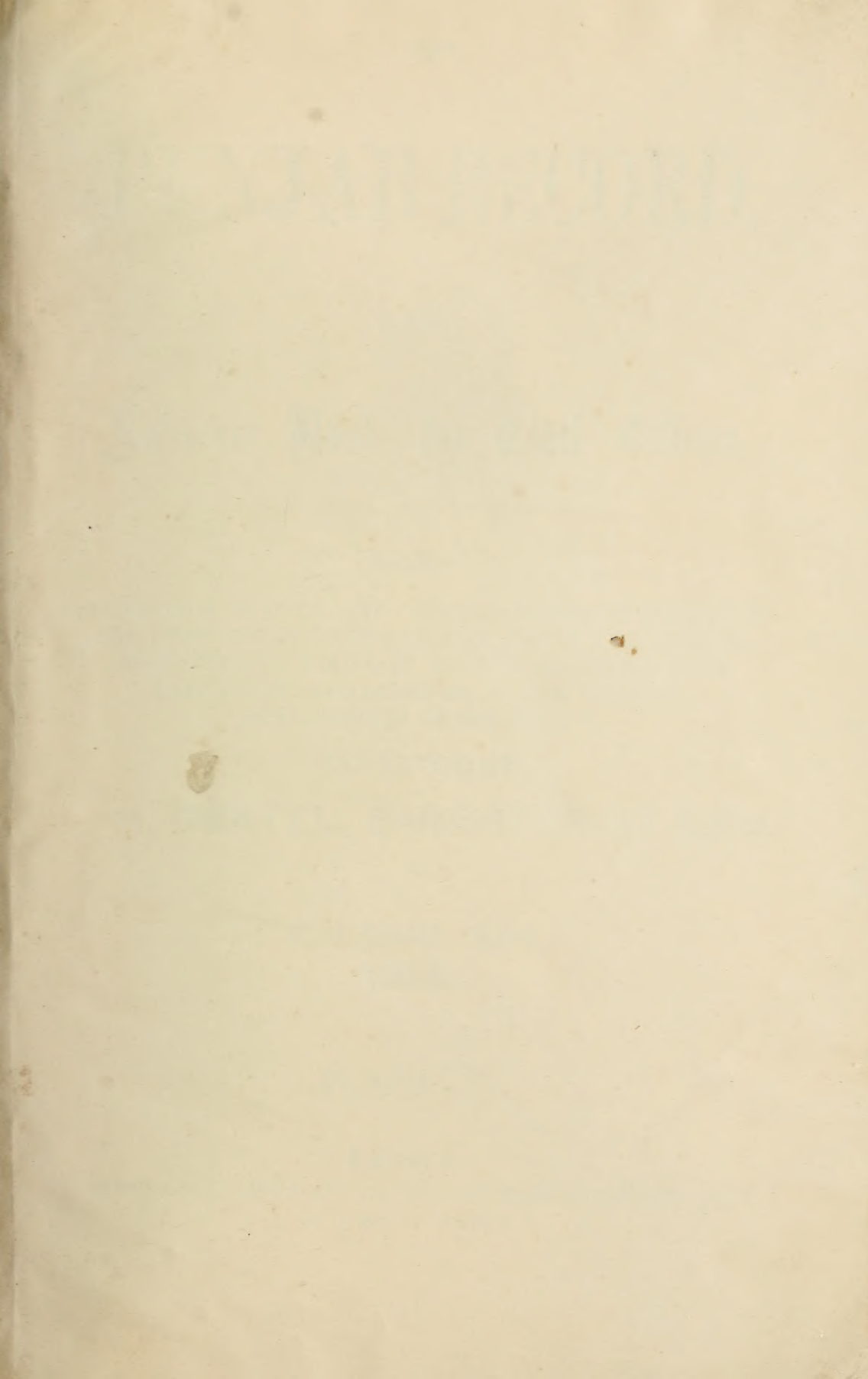


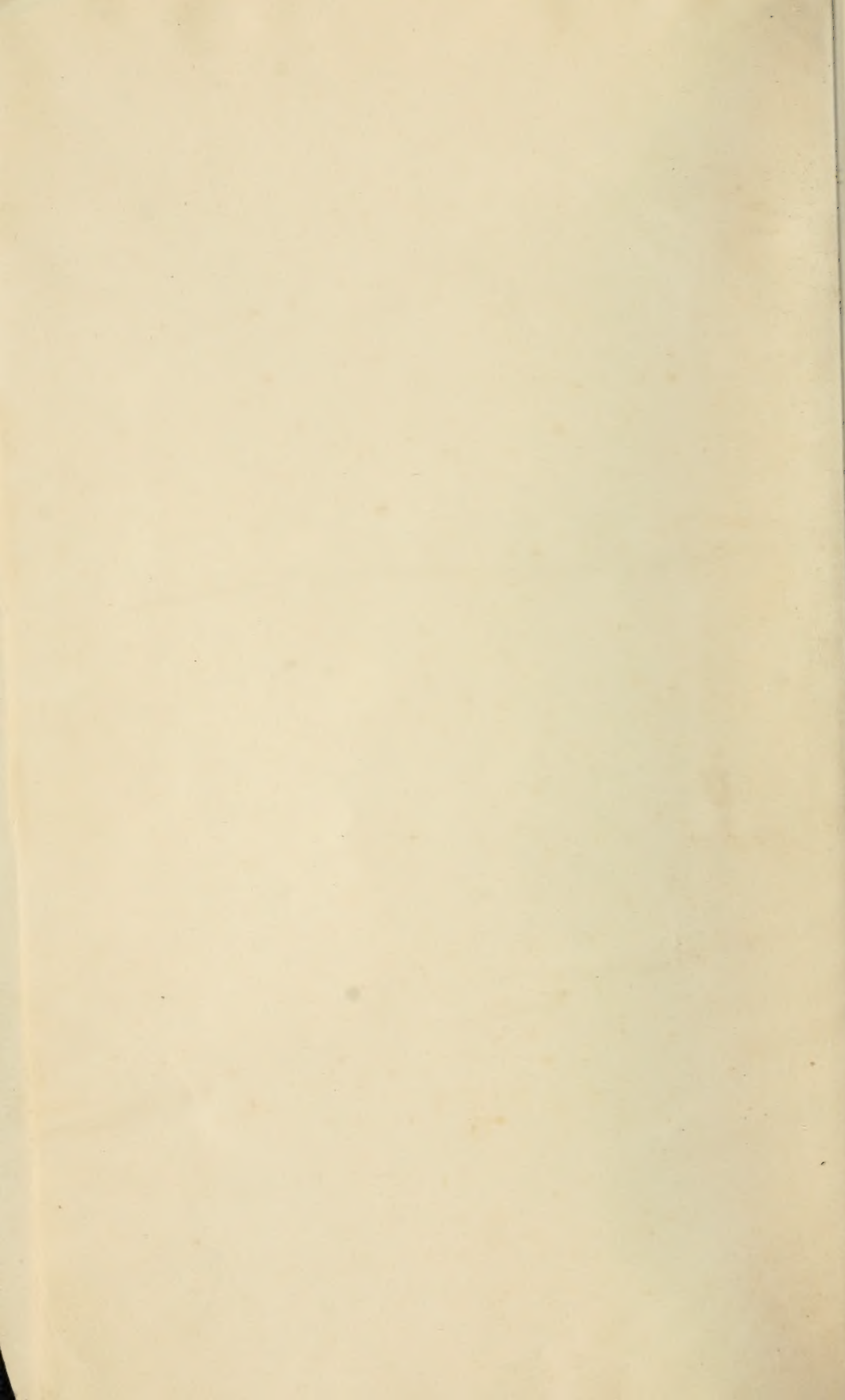


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THE

# PUNJAB RECORD,

OR

Reference Book for Civil Officers,

CONTAINING

THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY  
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM  
THAT COURT, AND DECISIONS BY THE FINANCIAL  
COMMISSIONER OF THE PUNJAB.

REPORTED BY

H. OERTEL, BARRISTER-AT-LAW.

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# JUDGES OF THE CHIEF COURT.

1910.

## CHIEF JUDGE

THE HON. SIR ARTHUR REID, KT *Chief Judge.*

## JUDGES :

THE HON. MR. JUSTICE F. A. ROBERTSON—*on leave from 8th February 1910.*

„ „ A. KENSINGTON—*on leave from 1st January 1910 to 7th August 1910.*

„ „ „ D. C. JOHNSTONE.

„ „ „ H. A. B. RATTIGAN—*on leave from 5th April 1910 to 7th August 1910.*

„ „ „ SHAH DIN, K. B.

„ „ „ A. WILLIAMS—(*Officiating Judge*) *from 1st January 1910 to 18th April 1910.*

„ „ „ W. CHEVIS—(*Temporary Additional Judge*) *from 8th February 1910.*

„ „ „ H. SCOTT-SMITH—(*Officiating Judge*) *from 19th April 1910 to 7th August 1910.*

„ „ „ A. E. RYVES—(*Temporary Additional Judge*) *from 6th April 1910 to 7th August 1910.*





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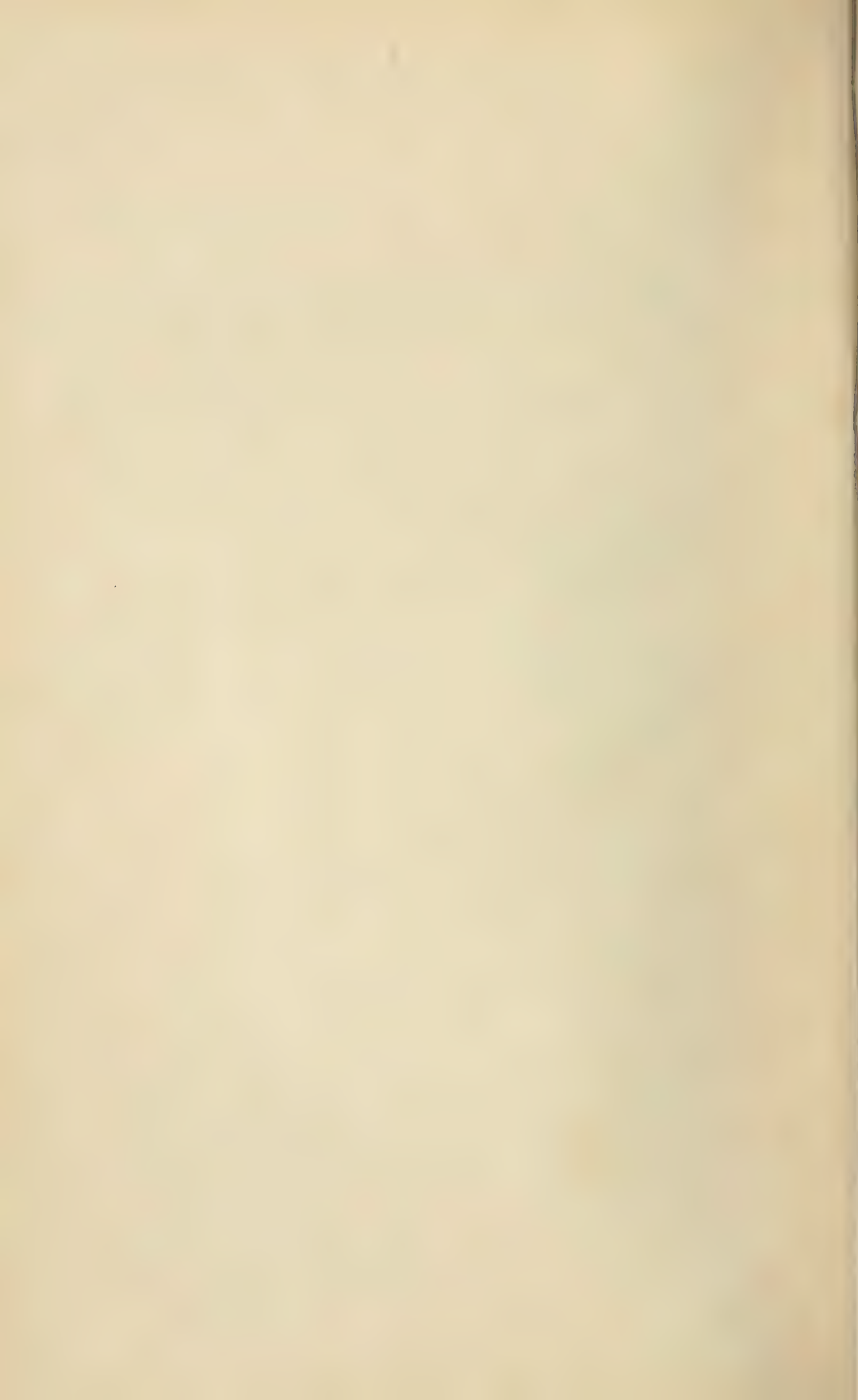
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See *Punjab Pre-emption Act* (2) ... 87

## ATTACHMENT.

Salary of Assistant Surgeon in military empoly not attachable in execution of decree.

See *Execution of decree* (3) ... 10

## AWARD.

A suit can be brought upon an award independently of the summary procedure authorized by section 525, Civil Procedure Code, 1882.

See *Civil Procedure Code, 1882* (11) ... 34

## B.

## BAHI ACCOUNT.

*Bahi account*—Proof and corroboration of.—section 34, *Indian Evidence Act, I of 1872*.—Where certain disputed items were interspersed in an otherwise true account in a village *bahi* which had, as a whole, been tendered in evidence and sworn to as correct by the plaintiff and was found by the Commissioner to be correct and regular according to village custom in that part of the country to which the parties belonged, the First Court having decreed the suit in part, the Divisional Judge on appeal dismissed it *in toto* on the ground that the *bahi* was unreliable.

*Held*, by the Chief Court that there was sufficient proof in support of the claim... 80

## BRAHMINS.

(1) Brahmins of *mauza* Mankiala, *tahsil* Gujar Khan, district Rawalpindi, are governed by Hindu Law.

See *Custom—Succession* (1) ... 1

Brahmins of Ajnala, district Amritsar, follow agricultural custom.

See *Custom—Alienation* (9) ... 63

*The references are to the Nos. given to the cases in the "Record."*

BURDEN OF PROOF.

Nos.

(1) The initial presumption in regard to Brahmins is that they are governed by Hindu Law, and the *onus probandi* is on the person who denies it.

See *Custom—Succession* (1) ... .. 1

(2) Village proprietary body claiming to succeed in preference to near collateral living in another village.

See *Custom—Succession* (5) ... .. 18

(3) As to claim regarding occupancy rights.

See *Occupancy holding* ... .. 38

(4) Of proving that the property alienated was not self-acquired in the hands of the last male-owner.

See *Custom—Alienation* (4) ... .. 42 *P.O.*

(5) Of proving the unfettered power to adopt a person who is not an agnate is on the party who sets up the power.

See *Custom—Adoption* ... .. 47

(6) Gift of ancestral land by a childless proprietor in favour of sister—Contest by the reversioners of the donor. *Onus* of proving the validity of the gift. Dhamrayas of Shahpur District.

See *Custom—Alienation* (11) ... .. 67

(7) *Onus* in pre-emption cases.

See *Punjab Pre-emption Act* (2) ... .. 87

C

CANTONMENTS ACT.

*Cantonments Act, XIII of 1889, section 4 (2)*—power of Government to define the limits of any cantonment so as to extend them—*General Clauses Act, X of 1897, section 14*.—Held, that looking at the Act as a whole, the word "define" in section 4 (2) of the Cantonments Act, 1889, must be construed to mean, define by way of extension as well as by way of retrenchment, and that under section 14 of the General Clauses Act, 1897, such power can be exercised from time to time ... 24

CANTONMENTS (HOUSE ACCOMMODATION) ACT.

*Cantonments (House Accommodation) Act, II of 1902, section 19—Transfer of Property Act, IV of 1882, section 108 (f)*—*Indian Contract Act, IX of 1872, section 70*—Repairs done by tenant—Cost deducted from rent.—Where the defendants occupied the plaintiff's house by reason of its having been allotted to their department by the cantonment authority under the Cantonments (House Accommodation) Act, 1902, and plaintiff had refused to execute necessary repairs—

The references are to the Nos. given to the cases in the "Record."

Nos.

## CANTONMENTS (HOUSE ACCOMMODATION) ACT--*conold.*

*Held*, that the relation between the parties having been settled by a special Act, the application of the general law was ousted and consequently--

- (a) the defendant's remedy was under section 19 *et seq.* of that Act and the rule embodied in section 108 (f) of the Transfer of Property Act did not apply ;
- (b) the Civil Court had no jurisdiction to decide the question of necessity for repairs and their cost under section 70 of the Contract Act, 1872.

*But also*, that a finding by the cantonment authority under the provisions of section 19, that repairs were necessary and their cost, would enable the Civil Courts to decide whether under section 70 of the Contract Act money paid by the tenant for repairs should, or should not, be deducted from the sum claimed for rent due ...

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## CIVIL PROCEDURE CODE, 1882.

### (1) SECTION 13.

*Res judicata*—Provisions of old Code applicable also in Appellate Court where suit was instituted before new Civil Procedure Code, 1908, came into force.

See *Hindu family* ... .. 97

### (2) SECTIONS 13 AND 43.

See *Estoppel* ... .. 32

(3) *Civil Procedure Code, 1882, section 43 (Order II, rule 2 of new Code)*—Previous suit for interest only, after expiry of term of mortgage—Second suit for subsequent interest barred.—Where a mortgagee after the date of expiry of the mortgage term sued only for the interest due and not for the principal, though both principal and interest were then payable—

*Held*, that he was precluded by the provisions of section 43 of the Civil Procedure Code, 1882, from suing for the principal subsequently. Interest being accessory to the principal, it follows that a subsequent suit for interest, although accrued due after the decision of the previous suit, is equally barred, if the claim for the principal is barred.

28 P. R. 1907 followed—*Vashvant Narayan Kamat v. Vithal Divakar Parulikar* (1897) I. L. R. 21 Bom. 267 differed from ... ..

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(4) *Civil Procedure Code (1882), section 43—Proceedings in Revenue Court no bar to a Civil Court—Jurisdiction of Civil and Revenue Court—Claim for land in addition to that allowed in partition proceedings—Punjab Land Revenue Act, XVII of 1887, section 158 (1).*—In mutation proceedings in 1903 plaintiffs were recorded as owning 16 shares and defendants 32 shares out of 480 shares in a joint *khata*. This *khata* was subsequently split up and a new *khata* No. 10 formed out of part of it, in which plaintiff was shown as owning one-sixth according to what had gone before. In 1905 plaintiffs themselves applied to the



The references are to the Nos. given to the cases in the "Record."

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revenue authorities for partition of *khata* No. 10 without specifying their own share and partition was duly made and was formally accepted by them, one-sixth share having been allotted to them. On a suit now brought by the plaintiffs in a Civil Court asking one-twelfth share more on the ground that the mutation of 1903 was wrong.

*Held*, that section 43, Civil Procedure Code, 1882 cannot be used to bar a suit in a Civil Court, because of something that has happened in a Revenue Court, and section 158 (2), Land Revenue Act has no bearing on the case.

But *held* also, that section 158 (1) of the Punjab Land Revenue Act prevents a Civil Court from taking cognizance of the matter ...

8

(5) *Civil Procedure Code, Act XIV of 1882, section 214—(Order 20, rule 14, Civil Procedure Code, Act V of 1908)—Pre-emption suit—Price fixed by first Court—Decretal amount paid in after deducting costs—Price raised by Appellate Court—Payment of difference without costs previously recovered—Sufficient compliance.*—Where in a suit for pre-emption the first Court passed a decree for possession of certain property on payment of Rs. 430 authorising the pre-emptor to deduct Rs. 5-14-0 as costs, and it was so paid by the pre-emptor within the time fixed by Court, but on appeal by the vendee the price was raised to Rs. 512, reversing the order as to costs, but no notice of the exact additional amount payable was given to the pre-emptor, who paid in Rs. 82 (the difference between Rs. 430 and Rs. 512), whereupon the vendee contended that the order of the Appellate Court had not been complied with.

*Held*, following *Balmokand v. Pancham* [ (1888) *I. L. R.* 10 *Al.* 400] that the payment of the difference within the time allowed without the costs already realised was a sufficient compliance with the decree of the Appellate Court and the vendee was separately entitled to recover costs ...

56

(6) *Civil Procedure Code, 1882, section 230—Execution of decree—Limitation—Continuation of previous application for execution—Fraud.*—Where an application for execution of a decree was made on the 11th May 1906 by attachment and sale of *moveable property*, which was fully attached and sold, but the money was not paid to the decree-holder owing to an appeal filed by the judgment-debtor, nor had the application ever been definitely struck off the file or consigned to the record-room, and other applications were made on the 10th March and 15th June 1908 for attachment and sale of *houses* not mentioned in the application of 11th May 1906,

*Held*, that the applications of 1908 were fresh substantive applications and not merely continuations of the former application.

*Held* also, that it is doubtful whether it is open to the decree-holder to raise questions of fraud and claim the benefit of the last sentence of section 230, Civil Procedure Code, 1882, for the first time in appeal, and that the mere fact that the judgment-debtor filed an appeal in connection with the execution proceedings in 1906 did not constitute fraud ...

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(7) Sections 244 and 311—Application to have sale set aside by reason of defective attachment.

See *Execution of Decree* (2) ... 40

(8) *Civil Procedure Code, 1882, section 258—Satisfaction of decree out of Court—Suit for declaration that the decree had been satisfied—Maintainability of such suit.*—*Held*, that although section 258 of the Civil Procedure Code, 1882 specifically enacts that an uncertified adjustment cannot be recognized as an adjustment of the decree by any Court executing the decree, it is implied that it may be recognized as such by a Court trying the matter as a regular suit, and therefore a suit for a declaration that the decree had been satisfied is maintainable, notwithstanding that its object is to restrain the decree-holder from executing the decree. ... 16

(9) *Civil Procedure Code, 1882, section 281—Adjudication on merits—Limitation—Indian Limitation Act, XV of 1877, article 11.*—N. M. in execution of his decree against T. D. attached the house in dispute on 20th June 1902. Mussammatt J. and L. objected to attachment, an enquiry was made by the executing Court, and on 14th October 1903, in the absence of the decree-holder, an *ex parte* order releasing the house was passed in the following words: "Aj digridar hazer nahin hai, misl iya ba adam pirri dakhil daftar hai hai, libaza jaidad makruka waguzir howe, misl dakhil daftar ho." The decree-holder again attached the house in the same decree on 4th June 1907, and the District Judge released the house on the ground that having once been released it could not be attached again. Thereupon the decree-holder, on 29th August 1908, brought the present suit. The first Court, holding the suit time-barred, dismissed it, and the Divisional Judge remanded the case for decision on the merits, being of opinion that the order of 14th October 1903 was not one under section 280 of the Civil Procedure Code, 1882, inasmuch as it was *ex parte* and there being no adjudication on the merits. On appeal to the Chief Court—

*Held*, that notwithstanding the wording of the order, dated 14th October 1903, it was an adjudication on the merits under section 280, Civil Procedure Code, 1882, inasmuch as the objector had actually produced his evidence, and the decree-holder after several hearings produced none and absented himself on the last hearing, and that consequently the suit was barred under article 11, schedule II of the Indian Limitation Act, 1877 ... 28

(10) The difference in procedure between the new Code, order XXI, rules 97, 99 and 103 and the old Code, section 331, pointed out.

See *Execution of decree* (5) ... 14

(11) *Civil Procedure Code, Act XIV of 1882, section 525—Suit based on award—right of appeal.*—*Held*, that a suit can be brought upon an award independently of the summary procedure authorized by section 525 of the Civil Procedure Code, 1882 at any period which the law for the limitation of suits permits, and a decree made in such a case is appealable though there would be no appeal from a similar decree made in the summary proceedings under Chapter XXXVII of the Code ... 34



The references are to the Nos. given to the cases in the "Record."

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<b>CIVIL PROCEDURE CODE, 1882—concl'd.</b>	
(12) <i>Civil Procedure Code, 1882, section 539—Collector's sanction not open to revision by Chief Court.—Held, the Chief Court cannot revise an order of a Collector granting permission under section 539 of the Civil Procedure Code, 1882 to institute a suit for the removal of a mahant</i> ... ..	104
(13) <i>Remand under section 562—Appeal.</i>	
In a case where an appeal would not lie from the final decree of the Divisional Judge, no appeal lies to the Chief Court from the order of the Divisional Judge, remanding a case under section 562 of the Civil Procedure Code, 1882.	
See <i>Civil Procedure Code, 1908 (9)</i> ... ..	101
<b>CIVIL PROCEDURE CODE 1908.</b>	
(1) Sections 2 (17) and 60 (1), (i)— <i>Procedure—Attachment of pay of an Assistant Surgeon in military employ.</i>	
See <i>Execution of decree (3)</i> ... ..	10
(2) <i>Civil Procedure Code, Act V of 1908, section 151, order XXI, rule 29 and order XLI, rule 5—Stay of execution.—H. K. obtained a decree against B. K. in 1907, execution of which was stayed on appeal pending the decision of a counter-case brought by B. K. against H. K.—B. K.'s suit having been dismissed and an appeal preferred to the Chief Court, B. K. asked for stay of execution of H. K.'s decree of 1907, pending hearing of the appeal in her (B. K.'s) case. It was contended on the authority of Guest v. McGregor (41 P. R. 1904) that the Court had no power to accede to this prayer.</i>	
<i>Held</i> , that since the passing of the new Civil Procedure Code, the dictum contained in <i>Guest v. McGregor</i> (41 P. R. 1904) was no longer applicable, and that the order sought for could be made under section 151 of that Code.	
<i>Held</i> also, that an Appellate Court has, generally speaking, as full powers as the Original Court and can do while the appeal is pending what the Original Court could have done while the suit was pending ... ..	82
(3) <i>Civil Procedure Code, Act V of 1908, order VIII, rule 6—Set-off—Kinds of—Held, that the law recognises two kinds of set-off, (1) statutory, and (2) equitable.</i>	
The statutory provisions contained in Civil Procedure Code, Act V of 1908, Order VIII, rule 6, are not exhaustive. Where a washerman declines or is unable to return articles made over to him to wash, his employer is equitably entitled to set-off the value when paying him his wages ... ..	77
(4) ORDER 20, RULE 14.	
See <i>Civil Procedure Code, 1882 (5)</i> ... ..	55
(5) Order XXI, rule 48 (3)— <i>Procedure where Commanding Officer refuses to carry out order for attachment of pay.</i>	
See <i>Execution of decree (3)</i> ... ..	10



The references are to the Nos. given to the cases in the "Record."

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CIVIL PROCEDURE CODE, 1908—*concl'd.*

(6) *Civil Procedure Code, Act V of 1908, order XXI, rules 83 and 89, and order XLIII, rule 1 (j)*—Application by judgment-debtor to set aside sale after the auction sale has taken place—refusal of such Application—appeal.

See *Execution of decree* (4) ... .. 72

(7) *Order XXI, rules 97, 99—103*—Procedure of executing Court in executing decree for possession when property is in possession of a third party—Difference between the old and new Code pointed out.

See *Execution of decree* (5) ... .. 14

(8) *Order XL, rule 1*—Appeal from order refusing to appoint a receiver.

See *Receiver* ... .. 36

(9) *Civil Procedure Code, 1908, order XLIII, rule (1) (u)*—Order of remand under section 562, *Civil Procedure Code, 1882*—Appeal—*Punjab Courts Act, XVIII of 1884, section 70 (1) (b)*—Revision.—Held, that under *Order XLIII, rule (1), clause (u)*, *Civil Procedure Code, 1908*, no appeal lies to the Chief Court from the order of the Divisional Judge, remanding a case under section 562 of the Code of Civil Procedure 1882, in a case where an appeal would not lie from the final decree of the Divisional Judge.

Held also, that in the circumstances of the case the Court must decline to interfere with the order of remand under clause (b) of section 70 (1) of the *Punjab Courts Act, 1884* ... .. (101)

(10) *Civil Procedure Code (1908), Act V of 1908, Order XLV, rule 7*—Appeal to Privy Council—extension of time for the deposit of security for respondents' costs—sufficient ground for.—Held, following *Banjore and Bhawani Pershad v. Mussammatt Bhagana* (L. R. 11 I. A. 7) and dissenting from *Ranga Sai v. Mahalakshamma* (1 L. R. 14 Mad. 391) that time allowed for the deposit of security for respondents' costs under order XLV, rule 7 of the Code of Civil Procedure, 1908 for appeal to Privy Council can be extended for cogent reasons and that poverty was sufficient reason for extension of time where the sum of money required was large and the diligence of the petitioner was shown by his having paid in  $\frac{3}{4}$ ths of the money required within the time originally allowed ... .. 44

## COLLATERALS.

*Locus standi of collaterals residing in another village to contest an alienation of self-acquired property by mother and widow of the last male owner*—*Sayads of mauza Tal Khalsa, district Rawalpindi.*

See *Custom—Alienation* (14) ... .. 71

## COMMISSION.

Commission on purchases is unlawful as being immoral and opposed to public policy.

See *Public Policy*... .. 91

*The references are to the Nos. given to the cases in the "Record."*

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CONDITIONAL SALE.

See *Mortgage by Conditional Sale* ... 22, 86

COURT FEES ACT, 1870.

(1) Value for purposes of Court fees of a suit for possession of immoveable property by a landlord against his tenant is a year's rent.

See *Valuation of Suits* (1) ... 27

(2) *Section 17—Suit embracing two or more distinct subjects—Value for Court-fees.*

See *Appeal, Civil* (7) ... 41

CUSTOM—ADOPTION.

*Custom—adoption—Adoption of brother's daughter's son without the consent of adopter's reversioners—Validity of—Hindu Jat agriculturists of Hoshiarpur Tahsil—onus probandi.—Held, that among Hindu Jat agriculturists of the Hoshiarpur tahsil of the Hoshiarpur district adoption of a brother's daughter's son is not valid without the consent of adopter's reversioners.*

*Held also, that the rule laid down in Ralla and others v. Budha (50 P. R. 1893, F. B.) is that among agriculturists the onus of establishing the unfettered power to adopt a person, who is not an agnate, is on the party who sets up the power, and that evidence of power to adopt a daughter's son does not shift the burden of establishing the power to adopt the son of a brother's daughter* ... 47

CUSTOM—ALIENATION.

(1) *Custom—Alienation—Pathans of Gurdaspur tahsil—Gift to daughters's son in presence of near collaterals—Different entries in riwaj-i-ams of different settlements.—Held, that a sonless Pathan proprietor of the Gurdaspur tahsil has by custom power to make a gift of ancestral land in favour of his daughter's son in presence of near collaterals* ... 21

(2) *Custom—Alienation—Will in favour of daughter and son-in-law—Khana-damad—Gujars of Gujrat district.—Held, that among Gujarats of the Gujrat district wills in favour of daughters and their husbands are valid only, if the latter is a duly appointed and regularly and continuously recognised "khana-damad"* ... 25

(3) *Custom—Alienation—Gift to married daughter, whose husband is khana-damad, valid as against collaterals—Kahuts, mauza Thirpal, tahsil Chakwal, district Jhelam.—Held, that among Kahuts of mauza Thirpal, tahsil Chakwal, district Jhelam, a gift by a father to his married daughter, who has never left her father's house and whose husband is khana damad, is valid against collaterals of the father* ... 31

(4) *Custom—Alienation—Alienation by father—Ancestral and self-acquired property—onus of proof—suit to set aside alienation as being made without legal necessity—conjecture and positive proof.—In a suit to set aside a deed of sale of immoveable property executed by the plaintiff's father, who had succeeded to it as the next reversionary heir on*

*The references are to the Nos. given to the cases in the "Record."*

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CUSTOM—ALIENATION—*contd.*

the death of the widow of the last male-owner, the plaintiff alleged that the land sold was ancestral property, and that the alienation had been made without legal necessity and was therefore void.

The evidence showed that the last male-owner had acquired some lands in the district by purchase and others on abandonment by collateral relatives, but there was no evidence defining the boundaries of these portions respectively, that being merely a matter of conjecture.

*Held*, that the *onus* of proving that the property alienated was not self-acquired in the hands of the last male-owner, was on the plaintiff, who could not under the circumstances derive any assistance from conjectures, however reasonable, in place of positive proof ... .. 42 P.C.

(5) *Custom—Alienation—Unrestricted power of a male proprietor to alienate ancestral lands without necessity, exception to general rule of the Customary law—Sahu Jats of mauza Dudah Sahu, district Montgomery.—Held*, that among Jats generally ancestral land is inalienable in presence of agnates except for necessity, but this general rule is not applicable to Sahu Jats of mauza Dudah Sahu, district Montgomery, where the common village bond has been broken by the introduction into the proprietary body of persons of different independent tribes whose lands all intermix and where many uncontested alienations have taken place in the presence of agnatic relations of the alienors ... .. 51

(6) *Custom—Alienation—Gift by a sonless proprietor to his daughter's sons—Validity of—Mirali Sials of Kabirwala tahsil, district Multan.—Held*, that among Mirali Sials of the Kabirwala tahsil (formerly called Serai Sidhu) of the Multan district a gift of ancestral land made by a sonless male proprietor in favour of the sons of a daughter, whose husband was a *khana-damad* and a near collateral, is valid ... .. 53

(7) *Custom—Alienation—Gift by widow to her daughter—Locus standi of collaterals—Succession of daughter—Sayads of mauza Chuma, tahsil and district Gurgaon.—Held*, that among Sayads of mauza Chuma, tahsil and district Gurgaon, daughters succeed to the property of their fathers to the exclusion of the latter's collaterals, and therefore the collaterals have no right to contest the gift made by the widow of the last male owner in favour of her daughter ... .. 58

(8) *Custom—Alienation—Alienation by widow—Locus standi of the sister of last male owner, in default of reversioners, to contest an alienation—Ghirths of mauza Baldhar, tahsil and district Kangra.—Held*, that among Ghirths of mauza Baldhar, tahsil and district Kangra, a sister of the last male owner is, in the absence of collaterals, entitled as the next heir to contest an alienation made by the widow and to obtain a declaration that such alienation shall not affect her reversionary rights. ... .. 60

(9) *Custom—Alienation—Alienation of ancestral property—Brahmins of Ajnala, district Amritsar.—Held*, that the parties to the suit, Brahmins of Ajnala, District Amritsar, whose family for the most part lives, and has lived in past generations, by agriculture and has given up priestly functions, follow agricultural custom and not Hindu law, and can therefore contest a transaction which was in effect an unauthorized and unlawful alienation of ancestral property ... .. 63



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CUSTOM—ALIENATION—*contd.*

Nos.

(10) *Custom—Alienation—Necessity—Childless proprietor borrowing money with a view to entering the army and for marriage—Lender's duty to see to application of the money.—Held*, that a mortgage of ancestral land by a childless proprietor for his intended marriage and to enable him to enlist in a cavalry regiment, though neither purpose is effected but steps are taken towards both, is binding on the reversioners and constitutes necessity and that in such cases the lender having made enquiry and found that the money was really required for the purposes stated is not bound to see what the mortgagor actually does with the money ... ..

65

(11) *Custom—Alienation—Gift of ancestral land by a childless proprietor in favour of his sisters—Contest by the reversioners of the donor—Onus probandi—Dhamrayas of Shahpur District.—Held*, that among Dhamrayas, a small endogamous agricultural tribe of the Shahpur District, the collateral reversioners of the donor are entitled to obtain a declaration that a gift of the whole of his ancestral land by a childless proprietor to his sisters shall not affect their reversionary rights after the death of the donor. And that the *onus* of proving the validity of the gift was on the sisters who failed to discharge it ... ..

67

(12) *Custom—Alienation—Bequest of ancestral land by a childless proprietor in favour of sister's son—Validity of—Kahuts of tahsil Chakwal, District Jhelum.—Held*, that among Kahuts of tahsil Chakwal, District Jhelum a bequest of ancestral land with the consent of his brother by a childless proprietor in favour of his sister's sons who were agnatically related to the testator in the fifth degree and who had rendered services to him, is valid by custom ... ..

68

(13) *Custom—Alienation—Sale of house by non-proprietor—Mauza Talwandi Kalan, tahsil Jagraon, district Ludhiana.—Suit for ejectment of vendee—Acquiescence by proprietors.—Held*, that a custom had not been established authorising the non-proprietors of mauza Talwandi Kalan, tahsil Jagraon, District Ludhiana to alienate without the consent of the proprietary body their right of residence in houses occupied or erected by them and that on leaving the village they were entitled merely to sell or remove the materials.

*Held* also, that a proprietor by attesting the sale deed of a non-proprietor and appearing before the Sub-Registrar acquiesces in the alienation and is debarred from contesting it ... ..

69

(14) *Custom—Alienation—Alienation of self-acquired property by mother and widow of the last male owner—Locus standi of collaterals residing in another village to contest the alienation—Syads of mauza Tal Khalsa, District Rawalpindi.—Held*, following *Daya Ram v. Sohel Singh* (110 P. R. 1906 F. B.), that by custom among Syads of mauza Tal Khalsa, district Rawalpindi, collaterals of the last male owner residing in another village have a *locus standi* to contest a sale of self-acquired land made by the mother and widow of the deceased without legal necessity ... ..

71

(15) *Custom—Alienation—Creation of mukarridari rights by widow—Permanent alienation.—Mussammatt B. J., Pathan of Parnali in the Attock District, Rawalpindi Division, created mukarridari rights in a*

The references are to the Nos. given to the cases in the "Record."

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### CUSTOM—ALIENATION—*concl'd.*

portion of her joint holding in favour of her son-in-law M. A., and received Rs. 300 *nazrana* from him, and mutation was sanctioned in favour of M. A. On 26th June 1908, B. J.'s husband's brothers (plaintiffs) sued for a declaration that this alienation should not affect their reversionary rights on the death or re-marriage of the widow. The First Court holding the *mukarridar* to be a tenant and the alienation for necessity, dismissed the suit. The Divisional Judge on appeal held that the creation of *mukarridari* rights amounts to a permanent alienation, and passed a decree in favour of plaintiffs fixing Rs. 124 for valid necessity. On revision the Chief Court—

*Held*, following *Maya Das v. Malik Aulia Khan* (10 P. R. 1896 Rev.) that the creation of *mukarridari* rights amounts to a permanent alienation ... .. 85

(16) *Custom—Alienation—Bunjahi Khatries of mauza Nara, tahsil Kahuta, district Rawalpindi, do not follow agricultural custom in matters of alienation.—Held*, that the *Bunjahi Khatries of mauza Nara, tahsil Kahuta, district Rawalpindi, (dhobi by occupation), do not follow agricultural custom in matters of alienation* ... .. 88

(17) *Custom—Alienation—Khokhars of Gujrat.—Held*, that in matters relating to alienation *Khokhars of the town of Gujrat (who are not dependent upon agriculture as a means of livelihood) do not follow custom but Muhammadan Law* ... .. 90

### CUSTOM—INHERITANCE.

See *Custom—Succession.*

### CUSTOM MARRIAGE.

*Custom—Marriage—Validity of Karewa marriage between a Jat and Koli woman—Succession.—Held*, that among Jats a *karewa* marriage of a Jat with a Koli woman is valid by custom, and such widow is entitled to succeed to the property of her late husband for her life ... 79

### CUSTOM—PRE-EMPTION.

*Custom—Pre-emption—existence of—town Kunjah, district Gujrat—conversion of tawela into serai—Punjab Courts Act, XVIII of 1884, section 70 (1) (b)—Sufficiently important question of law—value of instances cited.—Held*, that a custom of pre-emption exists in the town of Kunjah, district Gujrat.

*Held* also, that the mere fact that some of the rooms are rented out to more or less permanent tenants and others to chance visitors does not necessarily convert what was originally a *tawela* into a *serai*.

*Held* also, that in pre-emption cases the question whether a certain building is or is not on the facts found by the Lower Appellate Court a *serai*, is a question of law and of sufficient importance to justify the admission of an appeal under section 70 (1) (b) of the Punjab Courts Act, 1884.

*Held* further, following *Ramjas v. Bura Mul* (44 P. R. 1905) and *Muhammad Nawaz Khan v. Mussammatt Bobo Sahib* (44 P. R. 1903) that the admission of plaintiff's right by the defendant does not render the case valueless as a precedent in favour of the existence of a custom ... .. 96



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CUSTOM—SUCCESSION.

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(1) *Custom—Succession—Hindu Law—Brahmins of mauza Mankiala, tahsil Gujar Khan, district Rawalpindi—Onus probandi.—Held, that apart from local and special circumstances and conditions, the initial presumption in regard to Brahmins is that they are governed by Hindu Law, and that the defendants, on whom the onus probandi rested, have failed to prove that Brahmins of mauza Mankiala, tahsil Gujar Khan, district Rawalpindi, follow agricultural custom in matters of succession* ... .. 1

(2) *Custom—Succession of daughter—Gujars of Ludhiana District—Ancestral property—Will—Appointment of future khana-damad.—Held, that land acquired by pre-emption, the price of which was raised by mortgage of part of ancestral land, is not itself ancestral land.*

*Held also, that it has not been proved that among Mussalman Gujars of the Ludhiana district a sonless proprietor has the power to alter the ordinary rule of succession by will, in the sense that he can will ancestral land in absolute ownership to a daughter in presence of near collaterals or that he can by will appoint a future possible husband of his infant daughter to be his khana-damad.*

*Held further, that an unmarried daughter among these Gujars does hold her father's estate until death or marriage* ... .. 2

(3) *Custom—Succession—Haq-i-dastar—Eldest son entitled to larger share—Janjiana Siyals, mauza Kharanwala, district Jhang.—Held, that by a special custom prevailing among Janjiana Siyals of mauza Kharanwala, in the Jhang District, the eldest son is entitled upon final partition to receive certain extra land in addition to his share by way of "Haq-i-dastar" or "Haq-i-pagri."* ... .. 4

(4) *Custom—Succession—Land inherited by daughters—Daughter's daughter and sister and sister's sons exclude collaterals—Muhammadian Rajputs, Hoshiarpur District.—Held, that among Muhammadian Rajputs of Hoshiarpur (an endogamous tribe) where daughters have succeeded to their father's land as heirs, excluding his collaterals, their daughters are entitled to succeed to their mother's estate in the absence of direct male heirs on the death of any of them, and a sister or her sons would also exclude the collaterals in respect of such property* ... .. 5

(5) *Custom—Succession—Collateral residing in another village or village proprietary body—Escheat—Onus probandi.—Held, that a nephew of a deceased proprietor, who does not reside in the village where the deceased left land and is not a proprietor in it, succeeds to his uncle's property in preference to the proprietors of the village—And that the initial onus, generally speaking, would lie on the proprietary body to show that they had a right to exclude a near agnatic relative of the deceased owner from the inheritance.*

*Held also, that a right of escheat to the proprietary body cannot be presumed to exist; it must be affirmatively proved* ... .. 18

(6) *Custom—Succession—Adopted son and his son succeed to property in natural family, agricultural tribes, Gurdaspur district.—Held, that the ordinary rule under the Customary Law is that an adopted son*



The references are to the Nos. given to the cases in the "Record."

Nos.

CUSTOM—SUCCESSION—*contd.*

does not lose the right of succeeding in his natural family except possibly in the eastern Punjab (*i.e.*, the Delhi and Karnal districts), where the appointment of an heir approaches in nature more nearly to the adoption of the Hindu Law, and this applies *à fortiori* in the case of a son of the adopted son ... 37

(7) *Custom—Succession—Barren widow claiming a definite share in her husband's estate along with his son by another wife—Mughals of tahsil Rawalpindi.*—Held, under the *Riwaj-i-am* of Rawalpindi district which in the absence of evidence throwing doubt on its correctness should be followed, that among Mughals of Badia Qadir Bakhsh, *tahsil* Rawalpindi a barren widow is entitled to a definite portion of her husband's estate for life by way of maintenance in the presence of his son by another wife ... 49

(8) *Custom—Succession—Succession of widowed daughter-in-law in presence of near collateral—Onus of proving a special family custom—Quraishis of Ferozepore City.*—Held, that the defendant on whom the onus lay had failed to prove that among the Quraishis of Ferozepore City a widowed daughter-in-law succeeds to the property of her father-in-law in the presence of a near male collateral of the latter. No special family custom excluding the operation of Muhammadan Law was proved in this case... 50

(9) *Custom—Succession—Widow marrying her husband's brother—Succession to her late husband's estate in presence of his brother—Hindu Sikh Jats of Ferozepore District.*—Held, following *Mussammat Jai Devi v. Harnam Singh* (117 P. R. 1888) and *Mussammat Desi v. Lekna Singh* (46 P. R. 1891, F. B.) that among Hindu Sikh Jats of Ferozepore District a widow having married her husband's brother no longer remains the widow of her first husband, and consequently after the death without issue of her first husband's son she cannot succeed to a life interest in her deceased husband's estate in preference to his brothers—

*Punjab Singh v. Mussammat Chandi* (88 P. R. 1900) and *Mussammat Indi v. Bhanga Singh* (115 P. R. 1900) distinguished ... 64

(10) *Custom—Succession—Forfeiture of widow's estate—Effect of unchastity of widow subsequent to taking possession—Somal Jats of tahsil Phillour, District Jullundur.*—Held, that it was not established that by custom prevailing among Somal Jats of the Phillour *tahsil* in the Jullundur District a widow forfeits her right by reason of unchastity subsequent to taking possession of her late husband's estate ... 74

(11) *Custom—Succession—Collateral succession of widow—Muhammadan Jats of tahsil Nakodar, district Jullundur.*—Held, that by custom among Muhammadan Jats of *tahsil* Nakodar, district Jullundur, a widow succeeds collaterally to the property to which her husband would have succeeded, if alive ... 98

(12) *Tarkhans of Amritsar city.*

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The references are to the Nos. given to the cases in the "Record."

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DAMAGES.

*Damages for breach of contract—measure of—Indian Contract Act, IX of 1872, section 74.—Held*, that in cases in which *ex necessitate rei*, it is impossible to fix the exact amount of damages actually resulting from a breach of contract, Courts of equity do not interfere with the contract of the parties who, in anticipation of the breach, have stipulated that a fixed sum should be regarded as the measure of compensation to be paid by the person violating the contract. In such cases the Courts will not exercise the power conferred by section 74 of the Indian Contract Act of reducing the contract damages ... ..

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(1) Unmarried daughter among Gujars of Ludhiana district holds her father's estate until death or marriage.

See *Custom—Succession* (2) ... ..

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(2) *Will in favour of daughter—validity of—*

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(3) A gift by a father to his married daughter, who has never left her father's house among Kahuts of mauza Thirpal, tahsil Ohakwal, District Jhelam, is valid.

See *Custom—Alienation* (3) ... ..

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(4) *Held*, that among Sayyads of mauza Chnma, tahsil and district Gurgaon, daughters succeed to the property of their fathers to the exclusion of the latter's collaterals.

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DAUGHTER'S DAUGHTER.

*Held*, that among Muhammadan Rajputs of Hoshiarpur District where daughters have succeeded to their father's land as heirs, excluding his collaterals, their daughters are entitled to succeed to their mother's estate in the absence of direct male heirs.

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DAUGHTER-IN-LAW.

Succession of widowed daughter-in-law in presence of near male collaterals—Quraishis of Ferozepore City.

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DAUGHTER'S SON.

(1) Gift of ancestral land in favour of daughter's son in presence of near collaterals.

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## ESTOPPEL.

*Estoppel—Civil Procedure Code, Act XIV of 1882, sections 13 and 43—Merger of mortgage in previous money decree—Cause of action—Relationship of landlord and tenant—Jurisdiction of Civil Court—Appeal under section 70 (1) (b)—Findings of fact.*—In 1888 B. S., a usufructuary mortgagee, sub-mortgaged his rights to G. S., the terms being that the latter should be put into possession and that the former should be personally liable for the mortgage-money. In 1900 G. S. sued for principal and interest, alleging that he had never been put into possession and obtained a decree for the principal only against the property mortgaged, as according to the statement of B. S. (the defendant), G. S. had been holding possession. This decree was affirmed on appeal in 1901, but in consequence of the enactment of the Land Alienation Act, XIII of 1900, G. S. did not execute his decree, and in 1907 he brought the present suit for possession on the ground that B. S. had denied his title in 1905. The lower Courts found that G. S. had constructive possession of the land till 1905, and that there was no new agreement between the parties in 1901, and decreed plaintiff's claim.

*Held*, that as the value of the suit and appeal for purposes of jurisdiction was less than Rs. 1,000 no further appeal lay, and the lower Appellate Court's findings of fact could not be impugned—



*The references are to the Nos. given to the cases in the "Record."*

Nos,

**ESTOPPEL—concl'd.**

*Held*, also, that

(1) G. S.'s allegations in the former suit did not estop him from alleging in the present suit that he was in possession of the property up to within 12 years of the present suit;

(2) the suit was within limitation;

(3) neither section 13 nor section 43 of the Civil Procedure Code, Act XIV of 1882, was a bar to the suit;

(4) the mortgage did not merge in the decree obtained by G. S. in 1900, and a cause of action on the mortgage survived; and

(5) the facts found did not establish the relation of landlord and tenant between the parties and the Civil Courts consequently had jurisdiction ... ..

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**EXECUTION OF DECREE.**

(1) *Execution of decree—Joint decree for possession of immovable property—Devolution of right upon judgment-debtor by inheritance—decree extinguished pro tanto—Execution by one of several decree-holders.—Held*, following *Khudhai v. Sheo Dayal*, (1888) I. L. R. 10 All. 570, that where subsequent to a decree a portion of the right to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor or is acquired by him under a valid transfer, the inheritance or decree does not become incapable of execution, but is extinguished only. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immovable property.

*Held* also, following *Harrish Chunder Chowdhry v. Kali Sunderi Debi*, (1882) I. L. R. 9 Cal. 482 P. O., that co-plaintiff can obtain execution according to the extent of his interest in the decree and that there is nothing in the former Code of Civil Procedure which bars such an application ... ..

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(2) *Execution of decree—Civil Procedure Code, 1882, sections 244 and 311—Application to have sale set aside by reason of defective attachment—Limitation—Indian Limitation Act, XV of 1877, Schedule II, Article 166.—The decree-holder applied for execution by attachment and sale of the four shops 2115 to 2118 and filed a plan, correctly showing the boundaries of the shops. In the warrant of attachment the numbers were recorded as 2115, 2125, 2118, but the boundaries and measurements were accurately recorded and in the advertisement of sale the correct numbers were recorded. The sale was effected on the 10th May 1907. On the 14th August 1907 another application was filed under section  $\frac{3}{2} \frac{1}{2} \frac{1}{4}$  of the Civil Procedure Code, 1882, and was dismissed by the first Court on the ground that it was an application under section 311, and time-barred under Article 166 of the Indian Limitation Act, 1877. The lower Appellate Court, following *Lala Seva Ram v. Kanshi Ram* (76 P. R. 1890) found that section 311 did not apply, the sale being void by reason of the attachment being imperfect. On appeal to the Chief Court—*

*Held*, dissenting from *Lala Seva Ram v. Kanshi Ram* (76 P. R. 1890) and following *Sheodhyan v. Bhola Nath* (1899) I. L. R. 21

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EXECUTION OF DECREE—*concl'd.*

*All.* 311) that the error in the warrant of attachment constituted merely a material irregularity which could be the subject of objection to the sale under section 311, Civil Procedure Code, 1882, and did not render the sale void *ipso facto*, and thereby oust the provisions of section 311 and make section 244, Civil Procedure Code, 1882, applicable. The application must be treated as having been made under section 311, Civil Procedure Code, and was barred by limitation under Article 166 of the Second Schedule of the Indian Limitation Act, 1877

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(3) *Execution of decree—Attachment of salary of Assistant Surgeons in military employ—Army Act, 1881, sections 136, 144, proviso 1, and section 190—Civil Procedure Code, 1908, section 2 (17) and 60 (1) (i)—Procedure where Commanding Officer refuses to carry out attachment—Order XXI, rule 48 (3).* Held, that the pay of an Assistant Surgeon in military employ, not being a public officer within the meaning of section 60 (1) (i), Civil Procedure Code, 1908, is protected from attachment in execution of a decree.

Held also, that where a Commanding Officer refuses to comply with an order of attachment, although the pay is attachable, the Court under order XXI, rule 48 (3), Civil Procedure Code, should proceed to recover from Government for the benefit of the decree-holder the sums which should have been stopped out of the judgment-debtor's pay, leaving Government to settle up as it pleases with its officer, the judgment-debtor

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(4) *Execution of decree—Application by judgment-debtor to set aside sale after the auction sale had taken place—Refusal of such application—Appeal—Civil Procedure Code, Act V of 1908, order XXI, rules 83 and 89, and order XLIII, rule 1 (j).* Held, that an application made by the judgment-debtor to have a sale of immovable property set aside after the auction sale had taken place without, at the same time, making a deposit, does not fall within the purview of either rule 83 or rule 89 of order XXI of the Civil Procedure Code, 1908, and consequently under order XLIII, rule 1 (j) an appeal does not lie from the order of the First Court refusing to set aside the sale

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(5) *Execution of decree—Decree for possession—Resistance by a third party in possession—Procedure of executing Court—Difference between the old and new Code—Civil Procedure Code, 1882, section 331—Civil Procedure Code, 1908, order XXI, rules 97, 99 and 103.* Held, that where execution proceedings of a decree for possession of the property is found to be in possession of a third party, who resists delivery of possession to the decree-holder, the executing Court should proceed under rules 97 and 99, order XXI of the new Civil Procedure Code, 1908, and make a summary enquiry into the claim of the third party that he is holding possession in good faith, and pronounce a decision, leaving the aggrieved party to his remedy by suit under rule 103.

The difference in procedure between the new Code and the old Code, section 331, pointed out...

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(6) *Execution of decree—Continuation of previous application for execution.*

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(5) Gift of ancestral land by a childless proprietor in favour of his sister—contest by the reversioners of the donor— <i>Dhamrayas</i> of <i>Shahpur</i> district.	
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<b>GUARDIAN AND WARDS ACT, 1890.</b>	
<i>Guardian and Wards Act</i> , VIII of 1890, section 7 (3)— <i>Muhammadan Law</i> —appointment of guardian by will—right of maternal grandmother— <i>Held</i> , that under <i>Muhammadan Law</i> the father of a girl who has not attained the age of puberty is not her lawful guardian in the presence of her maternal grandmother, and is not entitled to appoint a guardian by his will in supersession of the grandmother, and that a guardian so appointed is not a guardian appointed by will within the terms of section 7 (3) of the <i>Guardian and Wards Act</i> , 1890 ...	48

The references are to the Nos. given to the cases in the "Record."

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H

HAQ-I-DASTAR.

Among Janjiana Siyals of *mauza* Kharanwala, in the Jhang district, the eldest son is entitled upon final partition to receive extra land in addition to his share by way of *haq-i-dastar* or *haq-i-pagri*.

See Custom—Succession (3) ... 4

HINDU FAMILY.

*Hindu family—Partnership—Dissolution by death of partner—Indian Contract Act, IX of 1872, sections 238 and 253 (10)—Suit by widow of deceased partner for account and share in specific assets—Limitation—Indian Limitation Act, XV of 1877, Article 106—Khatris—Presumption of jointness—Disruption and re-union of some members—Hindu law—Status of widow—Self-acquired property—Res judicata—Application of old or new Code of Civil Procedure—General Clauses Act, X of 1897, section 6—Profits in land—Jurisdiction of Civil Court—Punjab Tenancy Act, XVI of 1887, section 77 (3) (k).—Held, that where the allegations for the plaintiff, the widow of a deceased member of a Hindu family (though not a joint family) were, that her husband's father was the sole proprietor of a business and had gifted to each of his two nephews (the defendants) a share in the business and they had allowed such shares to remain in the business ever since and it was not denied that they were all entitled to a share in the profits of the business to the extent of their respective shares, the relationship thus created is a partnership as defined in section 238, Indian Contract Act, and not a "hereditary trading partnership" under Hindu law.*

*Held also, that this partnership was dissolved by the death of plaintiff's husband in 1900 under section 253 (10) of the Act, and that this suit, instituted in 1906, which was in substance merely a suit for an account of a dissolved partnership, was consequently barred by time under Article 106 of the Indian Limitation Act.*

*Held also, that it was the duty of the Court suo moto to see, if upon the allegations in the plaint a suit was in time as a whole or in part, notwithstanding that the defendants pleaded limitation only in regard to part of the claim, and that this rule applied equally to a Court of Appeal.*

*Held further, dissenting from Merwanji Harmasji v. Rustamji, (1882) I. L. R. 6 Bom. 628 (635), and Sokhanada v. Sokhanada, (1905) I. L. R. 28 Mad. 344 and following Rivett Carnac v. Gopal Das, (1896) I. L. R. 20 Bom. 15, that the suit for a general account being barred by time, it was also barred in respect of specific assets of the business acquired within three years of institution of suit.*

*And that article 106, Limitation Act, applied to every suit in which plaintiff claimed an account of the general partnership property and his share in the same and its profits.*

*Held also, that among Khatris, residents in a town and in no way agriculturists, brothers were presumably members of a joint family.*

The references are to the Nos. given to the cases in the "Record."

Nos.

# HINDU FAMILY—concl'd.

And following *Bala Bakhsh v. Rukhma Bai*, (1903) I. L. R. 30 Cal. 725 P. C. that where one co-partner separated from the others, there was no presumption that the latter remained united, and, when upon such separation the shares of the other co-partners were fixed, there was a virtual separation of all and an agreement amongst the remaining members of a joint Hindu family to remain united, had to be proved like any other fact.

(The meaning of the ruling by their Lordships of the Privy Council in *Parbati v. Naunihal Singh*, (1909) I. L. R. 31 All. 412 P. C. explained.)

Held further, following *Bala Baksh v. Rukhma Bai*, (1903) I. L. R. 30 Cal. 725 P. C. that "a re-union in estate" properly so called can only take place between persons who were parties to the "original partition."

Held also, following *Balwant Singh v. Rani Kishori*, (1898) I. L. R. 20 All. 267 P. C., that as regards self-acquired property a Hindu has plenary powers of disposition.

Held also, that where, in a previous suit by the present defendants as plaintiffs for recovery of a book debt the defendants, while admitting the debt, pleaded that it was due to the firm in which the husband of the widow (present plaintiff) had a two-third share and the widow was added as a co-plaintiff under section 32, Civil Procedure Code, 1882, and an issue was framed *inter alia* as to what was her share in the amount claimed, and the Court found that she was entitled to the share which her husband would have had if alive, that this was *res judicata* between her and her then co-plaintiffs (present defendants), and that it followed that she was equally entitled to a similar share in the rest of the property.

But, that a mere substitution as legal representative of her deceased husband in another suit had not the same effect.

Held further, that this question must be decided under the provisions of the old Civil Procedure Code of 1882, notwithstanding that the new Code of 1908 had come into force before the decision of the appeal in the Chief Court, as it involved a substantive and very real right to which the provisions of section 6 of the General Clauses Act, X of 1897, applied.

But also, that the rule enunciated in *Shamas Din v. Ghulam Kadir*, 20 P. R. 1891 F. B., was applicable only to ordinary Courts established in this country and was not affected by the question, whether having regard to the value of the two suits, a further appeal might be to the Judicial Committee in the one and not in the other, there being no appeal *as of right* in any case to His Majesty in Council.

Held also, that section 77 (3) (k) of the Punjab Tenancy Act, 1887, did not oust the jurisdiction of the Civil Courts from entertaining the claim for a share in profits of agricultural land which had been realised by the defendants and entered in the books as part and parcel of the assets of the business

... ..



The references are to the Nos. given to the cases in the "Record."

Nos.

## HINDU LAW.

(1) *Hindu law—Succession—Tarkhans of Amritsar City—Custom.*—*Held* that Hindu non-agriculturists residing in a city are, in the absence of proof of a custom by specific instances modifying Hindu law, presumably governed by that law, and that among Hindu Tarkhans of the Amritsar city a grandnephew as a *sapinda* succeeds in preference to a great-grandnephew and to the widow of a *sapinda*, whose husband predeceased the widow of the last male owner.

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(2) Initial presumption in regard to Brahmins is that they are governed by Hindu law.

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(3) Brahmins of Ajnala, District Amritsar, follow agricultural custom and not Hindu law.

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(4) Difference between hereditary trading partnership of joint family and ordinary partnership.

Presumption of jointness among Khatriis, residents of a town.

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(5) Partition—Where one co-partner separates from the others, there is no presumption that the others remain joint.

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(6) A Hindu has plenary powers of disposition as regards self-acquired property.

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(7) *Hindu law—Widow's right of residence in one of her husband's houses.*—*Held*, that under Hindu law, before the widow of a Hindu husband can claim a right of residence in one of her husband's houses, attached in execution of a decree against his representatives, she must prove affirmatively that none of the other houses are suitable for her accommodation

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## IMPERIAL ACT OF PARLIAMENT.

Under the Imperial Act, 11 and 12 Vict. C. 21, when an adjudication is made by the High Court, the estate of the insolvent vests in the official assignee, and he is the person to administer it,

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(3) Section 74.

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(4) *Indian Contract Act, IX of 1872, section 230 (3)*—*Personal liability of agent in British India for money due to a contractor for work done for a Rana outside British India*—*Limitation—Indian Limitation Act, XV of 1877, Article 56, and section 19, explanation (1)*—*Acknowledgment by agent.*—*Held*, that plaintiff suing for the balance of money due to him for work done for a Rana in his State situate outside British India was entitled under section 230 (3) of the Indian Contract Act, IX of 1872, to sue the defendant, the Rana's agent (*qua* the work) in British India from whom plaintiff had actually got the contract.

*Semle*, that article 56 of the Second Schedule of the Indian Limitation Act is applicable to such a suit.

*Held further*, that a letter addressed to the Rana by the defendants within 3 years from the date of the completion of the work by the plaintiff was a sufficient acknowledgment of liability in respect of the plaintiff's claim within the meaning of explanation (1) to section 19 of the Indian Limitation Act, as it admits in clear and definite language that plaintiff has a good and subsisting claim ... 43

(5) Section 238—difference between ordinary partnership and hereditary partnership of a joint Hindu family.

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(6) Section 253 (10), Hindu partnership dissolved by death of one partner.

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# INDIAN EVIDENCE ACT.

(1) Section 34—*Bahi account—Proof and corroboration of.*

See *Bahi Account* ... 80

(2) *Indian Evidence Act, I of 1872, section 90, Ancient document.*—*Held* that section 90, Indian Evidence Act, 1872, is not limited to cases in which the document is actually produced in Court and consequently secondary evidence of an ancient document is admissible without proof of the execution of the original when the document is shown to have been lost and to have been last heard of in proper custody ... 93

(3) Section 112—*Applicability of.*

See *Muhammadan Law* (2) ... 78

The references are to the Nos. given to the cases in the "Record."

Nos.

INDIAN LIMITATION ACT, 1877.

- (1) *Indian Limitation Act, XV of 1877, section 5—Appeal—Time taken up with review—Sufficient cause.—Held*, that filing a petition for review is not a "sufficient cause" within the meaning of section 5 of the Indian Limitation Act, 1877, for not presenting an appeal within time, unless it is shown that there were reasonable grounds for asking for a review ... 100
- (2) *Indian Limitation Act, XV of 1877, section 19—Acknowledgment—Mortgage entry in settlement record—Signature of one of the mortgagees and of Settlement Officer.—Held*, that where a suit is brought to redeem a mortgage more than 60 years old, and the plaintiff relies upon an entry in a settlement record (the signature of one of the two mortgagees being found at the end of the *muntakhib khawat* papers, in which the entry of mortgage occurs, though not on the entry itself) as an acknowledgment within the meaning of section 19 of the Indian Limitation Act, it must be shewn—
- (a) that the Settlement Officer, who signed the record, was an agent duly authorised by the two mortgagees to make the entry of the mortgage in the *muntakhib khawat*, or
- (b) that the signature (among a mass of other signatures) of one mortgagee at the end of that document in which it is not denied that these mortgagees are shewn also as proprietors of other holdings in the village, can be properly referred to this mortgage entry.
- Held* also, that neither of these conditions obtained in the present case. [Question discussed whether section 19, Limitation Act, was intended to apply to cases of acknowledgment of the continued existence of a mortgage) ... 39
- (3) Section 19, explanation 1.—Acknowledgment by agent—schedule II, article 56.
- See *Indian Contract Act, 1872* (4) ... 43
- (4) SECTION 19—Acknowledgment by agent.
- See *Principal and Agent* — ... 55
- (5) SECTION 28, articles 142 and 144.
- See *Absentee* ... 29
- (6) ARTICLE 11.
- See *Civil Procedure Code, 1882* (9) ... 28
- (7) Article 106—governs suit substantially for an account of dissolved partnership and for a share in the partnership property and assets, and if barred, the suit is equally barred in regard to claims for a share in specific assets of the partnership acquired within three years of institution of suit.
- See *Hindu Family*... ... 97
- (8) Schedule II, article 166, applicability of—
- See *Execution of Decree* (2) ... 40



The references are to the Nos. given to the cases in the "Record."

Nos.

## INDIAN LIMITATION ACT, 1877—*concl'd*

(9) Courts should *suo moto* see, that a suit is within time as a whole or in part, notwithstanding that defendant only pleaded limitation in regard to part of the claim.

See *Hindu Family* ... .. 97

## INDIAN LIMITATION ACT, 1908.

(1) *Indian Limitation Act, IX of 1908, article 85—Reciprocal demands—Bahi account.*—I. L. and others used to supply L. C. with capital by means of *hundis* and L. C. supplied them with goods. Up to the year 1954 Sambat the balance was sometimes in favour of I. L. and sometimes in favour of L. C., but after Sambat 1954 the balance was always in favour of I. L., though I. L. went on supplying cash and L. C. in turn supplied goods. Each year the balance was ascertained and carried over, but in Sambat 1959 a regular balance was struck and signed by L. C. It was contended by L. C. that after Sambat 1954 at any rate there was no mutuality, and that article 85 of the Indian Limitation Act, IX of 1908, was therefore inapplicable.

*Held*, by the Chief Court, that the suit was governed by article 85 of the Indian Limitation Act ... .. 75

(2) *Indian Limitation Act, IX of 1908, section 181—revision—limitation for.*—On the 25th April 1905 the Small Cause Court, Sialkot, dismissed plaintiffs' suit for *birt*. On appeal the District Judge remanded the case and the Small Cause Court then decreed the claim which however was dismissed on appeal to the District Judge. On revision the Chief Court held that no appeal lay to the District Judge and restored the order of the first Court. Plaintiffs then applied to the Chief Court for revision of the order of the first Court so restored and was met by the objection that his revision was long barred by time.

*Held*, by the Chief Court that the situation was anomalous but that revision was barred by time under article 181 of the new Limitation Act, 1908, as also article 178 of the old Act ... .. 92

## INDIAN OATHS ACT, X OF 1873.

*Indian Oaths Act, X of 1873, section 8—Form of oath—Affecting third person—Consent to abide by statement on oath—Competency of Court to administer such oath.*—Where the oath administered to the defendant was in these terms "If I lie in saying that I did not strike the balance and had paid the debt may my wife be considered to have been divorced from me."

*Held*, following *Ruldu Mal v. Bhupa* (36 P. R. 1873) and dissenting from *Ram Narain Singh v. Babu Singh*, (1896) I. L. R. 18 All. 46 that the oath was repugnant to decency, purported to affect a third person and was in contravention of section 8 of the Indian Oaths Act, 1873, and that the fact that the defendant accepted and took the oath did not validate it or create a bar to any objection by the plaintiff inasmuch as the Court was not competent to tender the oath to the defendant and was consequently barred from accepting the evidence so sworn ... .. 66

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Nos.

INDIAN STAMP ACT, 1899.

*Indian Stamp Act, II of 1899, section 5, articles 40 (b) and 57 (b)—Deed of mortgage executed by mortgagor, mortgagee and surety—Stamp duty leviable on such instrument.*—An instrument purporting to be a deed of mortgage in consideration of the loan of Rs. 2,000 was executed by three parties (1) mortgagor, (2) surety for the due fulfilment of the terms of the obligation, and (3) the party making the loan; and it bore a stamp of Rs. 10 as a mortgage-deed within the meaning of article 40 (b) of the Indian Stamp Act, 1899. On presentation before the Sub-Registrar at Peshawar a question arose, whether it should not in addition bear a stamp of Rs. 5 as falling also within the provisions of article 57 (b). On a reference by the Revenue Commissioner, North-West Frontier Province—

*Held*, that the instrument in question was properly stamped, inasmuch as the subject-matter of the agreement was but one, viz., the repayment of the amount of the advance, and the mere fact that there were two contracts embodied in the instrument, the one by the mortgagor and the other by the surety in respect of this matter could not bring the instrument within the purview of section 5 of the Stamp Act... ..15 F.B.

INSOLVENCY ACT.

*Insolvency Act, III of 1907, sections 13 and 16 (2)—Power of Insolvency Court prior to order of adjudication.*—*Held*, that an Insolvency Court has no jurisdiction prior to the order of adjudication to order the release of an applicant for insolvency who has rightly or wrongly been committed to prison by a Civil Court in execution of a decree and that before any order of adjudication is made the ordinary rights of a creditor to proceed against the person and property of a judgment-debtor remain unaffected. ... ..95

INSOLVENT.

(1) Proceedings.

See *Provincial Insolvency Act, 1907 (1 and 2)* ... ..11 & 12

(2) Administration of insolvent's estate—*Punjab Laws Act, 1872, section 27.*

See *Administration of Insolvent's Estate* ... ..45 P.C.

J

JOINT HINDU FAMILY.

(1) A suit by uncle against his minor nephew to establish the fact that a mortgage transaction effected by the minor's father was on behalf of the joint family does not effect a separation.

See *Minor and Guardian* ... ..23

(2) Difference between hereditary partnership of—and ordinary partnership pointed out.

See *Hindu Family* ... ..97

*The references are to the Nos. given to the cases in the "Record."*

Nos.

## JURISDICTION.

(1) It is not within the province of a Civil Court to determine whether the Deputy Commissioner should or should not grant a certificate in accordance with section 26 of the Punjab Court of Wards Act.

See *Punjab Court of Wards Act, 1903* ... .. 6

(2) Section 158 (1) of the Punjab Land Revenue Act prevents a Civil Court from taking cognizance of claim for land in addition to that allowed in partition proceedings.

See *Civil Procedure Code, 1882* (4) ... .. 8

(3) Civil Courts have no jurisdiction to deal with the terms offered to mortgagee by the Deputy Commissioner under section 9 (2) of the Punjab Alienation of Land Act, 1900.

See *Mortgage by Conditional Sale* (1) ... .. 22

(4) Conflict of—between two Courts having Insolvency jurisdiction.

See *Administration of Insolvent's Estate* ... .. 45 P.C.

## JURISDICTION OF CIVIL COURTS.

(1) *Jurisdiction—Miri' Court or Revenue Court—Suit by landlord for possession of land left by deceased occupancy tenant against a mortgagee of the occupancy rights.*—Held, that a suit by a landlord against the mortgagee for possession of the land left by an occupancy tenant on the ground that the tenant having died without heirs, the occupancy rights have been extinguished under section 59 (4) of the Punjab Tenancy Act, 1887, and the mortgagee's rights have *ipso facto* come to an end, is cognizable by a Civil Court ... .. 9

(2) See *Estoppel* ... .. 32

(3) *Jurisdiction—Suit by occupancy tenant for a declaration under section 45 of the Punjab Land Revenue Act, XVII of 1887—Re-enhancement of rent.*—The plaintiffs sued under section 45 of the Punjab Land Revenue Act, 1887, for a declaration that they, as occupancy tenants under section 5 of the Punjab Tenancy Act, 1887, were not bound to pay the enhanced rent laid down by a fresh entry in the record of rights, and that such entry was erroneous.

Held, following *Raja Nur Khan v. Darab Khatun* (25 P. R. 1889), and dissenting from *Bahadur Khan v. Sardar* (89 P. R. 1895), that the suit was exclusively cognizable by a Civil Court ... .. 73

(4) *Jurisdiction—Court cannot decide other question till point of jurisdiction settled.*—Where in a suit before a Munsif, 1st class, it was objected that the suit was undervalued, and that the value for jurisdiction purposes was Rs. 2,000, but the Munsif, without deciding the question of jurisdiction, dismissed the suit as barred by limitation.



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Nos.

JURISDICTION OF CIVIL COURTS—*concl'd.*

*Held* by the Chief Court, that the first question for decision is the jurisdiction of the Court in which the suit is filed. If the Court has not jurisdiction the proceedings are *coram non judice* and no question, either of fact or law, can be decided except that of jurisdiction. ... .. 83

(5) Where the relation of landlord and tenant was settled by the Cantonments (House Accommodation) Act, the application of the general law was ousted and consequently the civil courts had no jurisdiction to decide the question of necessity for repairs and their costs under section 70 of the Contract Act, 1872.

See *Cantonments (House Accommodation) Act* ... .. 103

JURISDICTION OF INSOLVENCY COURT.

Insolvency Court has no jurisdiction prior to the order of adjudication to order the release of an applicant for insolvency who has been committed to prison by a Civil Court in execution of a decree.

See *Insolvency Act* ... .. 95

JURISDICTION OF REVENUE COURTS.

*Punjab Tenancy Act, XVI of 1887, section 77 (3) (k)*—*Suit against a co-sharer for share of sale-proceeds of certain trees in a joint holding.*—*Held*, following *Nazam v. Joti Mal* (119 P. R. 1894) that a suit against a co-sharer for a share in the sale-proceeds of certain trees growing in a joint holding falls under clause (k) of section 77 (3) of the Punjab Tenancy Act, 1887, and that the Revenue Courts alone, therefore, have jurisdiction and that the fact that the defendants deny plaintiff's title as a co-sharer does not affect the question of jurisdiction.

*Held* also, following *Ram Jas v. Ralla* (25 P. R. 1909), that as the Munsif who happened to be also an Assistant Collector, 2nd grade, had no jurisdiction to try such suits, the decree should be set aside and plaint be registered in the Court of Assistant Collector, first grade ... .. 52

K

KHANADAMAD.

(1) Appointment of future possible husband of a daughter as *khanadamad* by will among Gujars of Ludhiana district invalid.

See *Custom—Succession* (2) ... .. 2

(2) *Held*, that among Gujars of the Gujrat District wills in favour of daughters and their husbands are valid only, if the latter is a duly appointed and regularly and continuously recognised "*khanadamad*."

See *Custom—Alienation* (2) ... .. 25

The references are to the Nos. given to the cases in the "Record."

## KHATRIES.

(1) Khatries of *mauza Nara, tahsil Kahuta*, district Rawalpindi, do not follow agricultural custom in matters of alienation.

See *Custom—Alienation* (16) ... .. 88

(2) Residents of a town, presumably joint.

See *Hindu Family*... .. 97

## L

## LANDLORD AND TENANT.

*Landlord and tenant—notice to quit.*—Where a tenant gave notice to his landlord that he would vacate on the 31st October 1908, but for some reason was unable to do so though the landlord took partial possession on the 30th October and after the tenant had vacated re-entered the vacant tenement.

*Held*, that the landlord was entitled to a new notice or failing this to a month's rent ... .. 94

## LEGITIMACY.

*Child born more than 280 days after the dissolution of his mother's marriage but less than 6 months after second marriage—Legitimacy of such child.*

See *Muhammadian Law* (2) ... .. 78

## LIMITATION.

(1) *Limitation—starting points of, on pleadings—Grant of shamilat land by Government—succession of, on death of grantor.*—By a *sanad* dated 10th April 1862 of the Government of the Punjab in favour of K. S. certain land out of the *shamilat* of village T. was granted to the grantee rent-free for life, and it was stipulated that the proprietary right was to remain in the family of the grantee on his demise subject to assessment. No compensation was paid by Government to the proprietary body and the land continued to be entered in the revenue papers as *shamilat*, K. S. and his widow after his death being shown only in the cultivating column. The brothers of K. S. had not cultivated any of the land, nor did they form a joint family with K. S. in 1862. On the death of K. S. and his widow the plaintiffs, proprietors in the village, claimed the land as *shamilat* and the defendants, nephews and grandnephews, claimed it as members of the family of K. S. with whom the proprietary right was to remain after his demise.

*Held*, that under the circumstances of the case the word "family," as used in the *sanad*, must be taken to be employed in its restricted sense, i. e. as meaning the wife and children and not all the blood relations of the grantee.

*Held* also, that as the plaintiffs in their plaint alleged that shortly before the suit they had asked the defendants, who are also members of the proprietary body, to retain possession of the land in suit which is

The references are to the Nos. given to the cases in the "Record."

Nos.

**LIMITATION—concl'd.**

*shamilat*, only to the extent of their own shares, but that they had refused to do so, and as the defendants did not in their pleas challenge the correctness of this allegation, the plaintiffs' cause of action really accrued, not on the death of K. S. or his widow, but when the defendants were asked to give up the area in excess of their shares in the land, and limitation only ran from that date and not from the death of K. S. or of his widow

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(2) *Limitation—Punjab Limitation Act, I of 1900—Suit for possession by collaterals after the death of widow but more than 12 years after the alienation of it by the last male owner.*—Held, following *Miran Bakhs v Ahmad* (145 P. R. 1907) and distinguishing *Khiali Ram v. Gulab Khan* (70 P. W. R. 1908, F. B.) that a suit for possession of land instituted in 1906 after the death of the widow of the last male owner by reversioners who had previously obtained a declaratory decree in respect of the gift by her, was not governed by the provisions of the Punjab Limitation Act, I of 1900, and was not barred by efflux of time, mutation in favour of the defendants having taken place on the basis of the gift in 1883, and the last male owner having died in 1886...

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(3) *Limitation for revisions.*

See *Indian Limitation Act, 1908* (2)

92

(4) Suits for an account of dissolved partnership and for a share in the partnership property and assets are governed by article 106, Indian Limitation Act, 1877, and if barred, a claim for a share in specific assets of the partnership acquired within 3 years of institution of suit is equally barred.

See *Hindu Family*

97

(5) Courts should *suo moto* see that a suit is within time as a whole or in part, notwithstanding that defendant only pleaded limitation in regard to part of the claim.

See *Hindu Family*

97

**LIMITATION ACT.**

See *Indian Limitation Act.*

**LIS-PENDENS.**

A sale to one pre-emptor during the pendency of a suit by another pre-emptor does not place the former in a better position to the latter.

See *Punjab Laws Act, 1872* (1)

7

**LOCUS STANDI.**

(1) Among Sayyads of *mauza Chuma*, *tahsil* and district Gurgaon, daughters succeed to the property of their fathers to the exclusion of the latter's collaterals, therefore the collaterals have no *locus standi* to contest the gift made by the widow in favour of her daughter.

See *Custom—Alienation* (7)

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**LOCUS STANDI—concl'd.**

(2) *Alienation by widow—Locus standi of the sister of last male owner in default of reversioners to contest an alienation—Ghirths of mauza Baldhar, tahsil and District Kangra.*

See Custom—Alienation (8) ... 60

(3) *Of collaterals residing in another village to contest an alienation of self-acquired property by mother and widow of the last male owner—Sayads of mauza Tal Khalsa, district Rawalpindi.*

See Custom—Alienation (14) ... 71

**M****MAINTENANCE.**

Under the *Rivaj-i-am* of Rawalpindi District a barren widow is entitled to a definite portion of her husband's estate for life by way of maintenance in presence of her stepson.

See Custom—Succession (7) ... 49

**MARRIAGE.**

See Custom—Marriage ... 79

**MATERIAL IRREGULARITY.**

Lower Appellate Court's taking wholly erroneous view of the frame of case and of plaintiff's real claim.

See Revision (1) ... 13

**MERGER.**

Of mortgage in previous money decree.

See Estoppel ... 32

**MINOR.**

(1) *Minor—appearance by—Guardian ad litem—Effect of decree against minor.—Where in the Lower Appellate Court one of the respondents, a girl (who was a minor), was described merely as being plaintiff's wife and not as a minor, and the appeal was decided without any guardian ad litem having been appointed to her—*

*Held, that the girl, not having been represented by a guardian, could not be treated as having appeared, though actually present in Court, and that the decree could not be treated merely as an ex-parte decree, and must be set aside* ... 35

(2) *Sale by minor—misrepresentation—Vendee acting in good faith—Refund of purchase-money.*

See Specific Relief Act ... 76

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## MINORITY.

The occupancy rights of minors are not lost, if they fail to manage the cultivation, their minority being a sufficient cause for their failure to cultivate.

See *Occupancy Rights* ... .. 3

## MINOR AND GUARDIAN.

*Minor and guardian—Appointment of guardian of person of a minor—Joint Hindu family—jointness—separation.—Held, following Gharibullah v. Khalak Singh [(1903) I. L. R. 25 All. 407] that the fact, that a Hindu minor and his uncle are joint in property as members of a joint Hindu family, does not bar the appointment of a third person as guardian of the minor's person, but does bar the appointment of such person as guardian of the minor's property.*

*Held also, that the fact that a Hindu minor is under the care of a person not interested as an heir does not of itself terminate the relations of the minor and his uncle inter se as members of a joint Hindu family—and that a suit by the uncle against the minor, to establish the fact that a mortgage transaction effected by the minor's father was on behalf of the joint family, does not effect a separation.*

*Held further, that there is no inconsistency in a guardian of the minor's person being appointed without any appointment of a guardian of the joint property, of which he is a coparcener :—* ... .. 23

## MISREPRESENTATION.

*Of age by minor—Vendee acting in good faith—Refund of purchase money.*

See *Specific Relief Act* ... .. 76

## MORTGAGE.

(1) *Merger of—in previous money decree.*

See *Estoppel* ... .. 32

(2) *Mortgage entry in Settlement record—signature of one of the mortgagees and of Settlement Officer—Acknowledgment.*

See *Indian Limitation Act 1877 (2)* ... .. 39

## MORTGAGE BY CONDITIONAL SALE.

(1) *Mortgage by conditional sale—Remedy of mortgagee since passing of Punjab Alienation of Land Act, XIII of 1900, vide section 9 (2).—Under the terms of a mortgage deed by way of conditional sale the sole remedy of the mortgagee for the enforcement of his right thereunder was to foreclose under Regulation XVII of 1806. Default having taken place, the mortgagee took proceedings under the Regulation, but infructuously, in 1897 and did nothing further till 1907, when he applied to the Deputy Commissioner for relief under sec-*

*The references are to the Nos. given to the cases in the "Record."*

Nos.

## MORTGAGE BY CONDITIONAL SALE—*concl'd.*

tion 9 (2) of the Punjab Alienation of Land Act, XIII of 1900. The Deputy Commissioner thereon offered him a farm of the mortgaged land for eight years, which the mortgagee refused, and then brought a suit for a money-decree against the mortgaged land or the mortgagor personally—

*Held*, that the mortgagee was not entitled in law to a money-decree, inasmuch as the effect of the Punjab Alienation of Land Act was, that the particular remedy given to the mortgagee under the terms of his contract, has been extinguished and another remedy substituted in lieu thereof, and that this relief was in the circumstances the only one open to the mortgagee.

*Held* also, that the Civil Courts had no jurisdiction to deal with the terms offered to the mortgagee by the Deputy Commissioner ... .. 22

(2) *Mortgage by conditional sale—Gift of equity of redemption prior to the expiry of mortgage term—Validity of such gift under Muhammadan Law—Notice of foreclosure to original mortgagor—Necessity of notice to donee.*—The plaintiffs instituted the present suit against the defendants for possession of certain land as absolute owners, alleging that the land was mortgaged by the father of defendants with condition of foreclosure if the entire land or a part thereof was not redeemed within six years. The land was not redeemed and the plaintiffs on 7th December 1898 served defendants' father with a notice of foreclosure. The year of grace expired on 16th December 1899, and plaintiffs became absolute owners. The defence was that the original mortgagor on whom the notice was served had no right of ownership at the time, as the land in dispute was gifted by him to defendants on 30th January 1897 by a registered deed of gift which was witnessed by J. S., one of the mortgagees, and therefore the proceedings in connection with the notice of foreclosure were ineffective and void, as it should have been issued to the donees. In reply plaintiffs contested the gift, alleging that the gift was not completed by delivery of possession. Both Courts below found in favour of defendants and dismissed the suit. On appeal the Chief Court—

*Held*, dissenting from *Muhi-ud-din v. Manohar Shah* [(1882) I. L. R. 6 Bom. 650] and *Ismail v. Ramji* [(1889) I. L. R. 23 Bom. 682] that under Muhammadan law a gift by a mortgagor of immovable property, of the equity of redemption was valid, placed the donee in the shoes of the donor and necessitated notice to the donee of foreclosure although the donor was still alive ... .. 86

## MUHAMMADAN LAW.

(1) Under Muhammadan law the father of a girl who has not attained the age of puberty is not her lawful guardian in the presence of her maternal grandmother, and is not entitled to appoint a guardian by his will in supersession of the grandmother.

See *Guardian and Wards Act*, 1890 ... .. 48



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MUHAMMADAN LAW—*concl.*

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(2) *Muhammadan Law—Acknowledgment—Child born more than 280 days after the dissolution of his mother's marriage but less than 6 months after second marriage.—Legitimacy of—Indian Evidence Act, I of 1872, section 112.*—One Mussammat R. was divorced by her first husband on the 1st October 1895. She married G. N. on the 4th February 1896 and bore a child on the 17th July 1896, the child was thus born more than 280 days after the dissolution of his mother's marriage with her first husband but less than 6 months after her marriage with G. N. The plaintiff contended that under Muhammadan Law no acknowledgment of paternity by G. N. could legitimise the child, and it was found that the *iddat* of repudiation had terminated before the marriage with G. N. although the child must have been procreated before the termination of that *iddat*. G. N. acknowledged the child and treated it as his own.

*Held*, that the marriage of Mussammat R. with G. N., though irregular, was not void, that when the child was born a marriage between his mother and G. N. subsisted; that section 112 of the Indian Evidence Act, 1872, was applicable to the case and the child was entitled to inherit to G. N. as his legitimate son ... 78

(3) *Gift of equity of redemption prior to the expiry of mortgage term—Validity of such gift under Muhammadan Law.*

See *Mortgage by Conditional Sale* (2) ... 86

(4) *Khokhars of the town of Gujrat follow Muhammadan Law.*

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MUKARRIDARI RIGHTS.

*Creation of mukarridari rights amounts to a permanent alienation.*

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*Childless proprietor borrowing money with a view to entering the army and for marriage, constitutes legal necessity.*

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NOTICE TO QUIT.

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OATH.

*Form of—affecting third person—consent to abide by statement on oath—Competency of Court to administer such oath.*

See *Indian Oaths Act, 1873* ... 66

*The references are to the Nos. given to the cases in the "Record."*

Nos.

## OCCUPANCY HOLDING.

*Occupancy holding—Succession—Punjab Tenancy Act, XVI of 1887, section 59 (c)—entry in Wajib-ul-arz regarding succession of bhaiya karabati—meaning of—Custom—onus probandi.—Held,* that where in the *Wajib-ul-arz* the occupancy tenants are recorded as stating, that if one of them should die without sons succession should go to *bhaiya karabati*, such entry, if viewed (1) as a record of custom, cannot be used to override or extend the scope of section 59 (c) of the Punjab Tenancy Act, XVI of 1887, and if viewed (2) as an agreement, should be interpreted in a reasonable way, and it is reasonable to suppose that the landlords, if they agreed at all agreed to the succession of such brothers and *karabati* only as might be entitled under tenancy law and custom, and the idea of a right accruing only to descendants of a person who once held the land, is a fundamental idea in the minds of the peasantry.

*Held* also, that the burden of proof is on the persons claiming occupancy rights, and they must prove that their ancestor once occupied the land ... .. 38

## OCCUPANCY RIGHTS.

*Occupancy rights—Effect of non-cultivation by a minor—Punjab Tenancy Act, 1887, section 38.—Held,* following *Lakha v. Thakar Dial* (9 P.R. 1910 Rev.) that under section 38 of the Punjab Tenancy Act, 1887, the occupancy rights of minors are not lost if they fail to manage the cultivation, their minority being a sufficient cause for their failure to cultivate ... .. 3

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*Joint Hindu Family—where one co-partner separates from the others, there is no presumption that the others remain joint.*

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## PARTNERSHIP.

(1) *Difference between ordinary and hereditary partnership of a joint Hindu Family.*

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(2) *Limitation—Suit for an account of dissolved partnership and a share in the partnership property and assets governed by article 106, Indian Limitation Act, 1877, and if barred, a claim for a share in specific assets of the partnership acquired within 3 years of institution of suit is equally barred.*

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Sufficient ground for extension of time for the deposit of security for respondent's costs in. Appeal to Privy Council.

See *Civil Procedure Code*, 1908 (10) ... 4

PRE-EMPTION.

(1) It is not "superior diligence" to file a suit a week before a rival pre-emptor files his suit.

See *Punjab Laws Act*, 1872 (1) ... 7

(2) *Pre-emption—Sale by Jat Sikh of a plot of land to an Indian Christian for the purpose of building a Christian Church or School—Pre-emptor not bound to carry out such purpose.—Held*, that when a plot of land is sold by a Jat Sikh to a Native Christian and the deed of sale states, that it is purchased by the latter for the purpose of erecting a Christian Church or School without any stipulation for avoidance of the sale if no such building is erected, a pre-emptor can take over the bargain without agreeing to erect such a building and the principle laid down in *Buldeo Das v. Piare Lal* (24 P. R. 1901) does not apply to such a sale ... 33

(3) *Pre-emption—New sub-division in an old town—Garhi Awan, Hafizabad, District Gujranwala.—Held*, that the custom of pre-emption does not prevail in the *abadi jadid* of the old village of Garhi Awan, a suburb of Hafizabad.

*Held* also, that the *abadi jadid*, which was situate just outside the old borders of the town, must be looked upon as a sub-division within the meaning of the Punjab Pre-emption Act, II of 1905, notwithstanding that it had not yet received a name as a *mohalla*, and that no sub-divisions were recognized in the old town ... 84

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*The references are to the Nos. given to the cases in the "Record."*

Nos.

PRE-EMPTION—*conclld.*

gagee in the previous suit amounted to acquiescence and waiver and that section 43 of the Civil Procedure Code, 1882, barred the suit. Both the Courts below decreed the claim. On revision the Chief Court—

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*Principal and agent—Goods received by agent on written authority—Suit against principal—Indian Limitation Act, XV of 1877, section 19—Acknowledgment by agent.—Held*, that under the provisions of section 19 of the Indian Limitation Act 1877, an acknowledgment may be signed by an agent duly authorized, and an agent who has authority to receive goods for his principal has also implied authority to sign an acknowledgment of balances due, and that such acknowledgment is good although the correctness of the amount charged is not admitted, and the acknowledgment is conditional and subject to the principal's approval.

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## PROBATE AND ADMINISTRATION ACT.

*Probate and Administration Act, V of 1881, section 86—Appeal from interlocutory order—Revision—Grounds for.—Where upon an application being made for letters of administration under the Probate and Administration Act (V of 1881), it was objected that the District Judge had no jurisdiction to entertain the application and that officer decided against the objection,*

*The references are to the Nos. given to the cases in the "Record."*

Nos.

**PROBATE AND ADMINISTRATION ACT—*concl'd.***

*Held*, that no appeal lay from the order of the District Judge under section 86 of the Act, inasmuch as the order was not one made by the District Judge by virtue of the powers expressly conferred upon him by the Act.

*Held* also, that the order being an interlocutory one on a point of jurisdiction no revision lay in the Chief Court. ...

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**PROVINCIAL INSOLVENCY ACT, 1907.**

(1) *Provincial Insolvency Act, III of 1907, section 43, not applicable to proceedings begun under section 25 of the Punjab Laws Act, IV of 1872—General Clauses Act, X of 1897, section 6, clauses (c), (d) and (e).*—*Held*, that under the provisions of section 6 of the General Clauses Act, X of 1897, proceedings against an insolvent begun under section 25 of the Punjab Laws Act and pending when the Provincial Insolvency Act, III of 1907, came into force and repealed the insolvency sections of the former Act, must be continued and punishment imposed where necessary, as if the latter Act had not been passed, inasmuch as the new Act lays down a different punishment. ...

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(2) *Provincial Insolvency Act, III of 1907, section 27, not applicable to proceedings begun under section 28 of the Punjab Laws Act, IV of 1872,—General Clauses Act, section 6, clauses (c), (d) and (e).*—*Held*, following *Ganpat Rai v. Malla Mul* (11 P. R. 1910) that as the provisions (now repealed) of section 28 of the Punjab Laws Act, IV of 1872, differ materially from those of the repealing enactment (The Provincial Insolvency Act, III of 1907, section 27), and the latter makes important alterations in the vested and substantive rights of parties, orders in connection with a composition deed filed before the new Act came into force, should be made under the old law (*vide* section 6 of the General Clauses Act, X of 1897). ...

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**PROVINCIAL SMALL CAUSE COURT ACT, 1887.**

*The Provincial Small Cause Court Act, IX of 1887, section 17—Payment of decretal amount in executing Court on an ex parte decree by another Court is equivalent to payment into the latter Court and does not bar an application for setting aside the ex parte decree.*—An *ex parte* decree was passed by the Cantonment Small Cause Court, Ambala, and transferred for execution to Multan. The judgment-debtor paid the decretal amount into the Multan Court on 3rd June, 1908 and made an application for setting aside the *ex parte* decree to the Ambala Court on 16th June, 1908, the Court rejected the application on the grounds that the decree had been satisfied and had ceased to exist inasmuch as the deposit under section 17 of the Small Cause Court Act, 1887, should have been made in the Ambala Court. The decree-holder took the money out of the Multan Court on 17th June—

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(1) *Held*, that in pre-emption cases the question whether a certain building is or is not on the facts found by the Lower Appellate Court a *serai*, is a question of law and of sufficient importance to justify the admission of an appeal under section 70 (1) (b) of the Punjab Courts Act.

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(2) Section 70 (1) (b).—Revision against an order of remand under section 562, Civil Procedure Code, 1882.

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## PUNJAB COURT OF WARDS ACT, 1903.

*Punjab Court of Wards Act, II of 1903, sections 26 and 31 (2), imperative—Non-production of a certificate bars further proceedings in a suit.—Held*, that the terms of section 31 (2) of the Punjab Court of Wards Act, 1903, are imperative, and prevent a Civil Court from proceeding with any suit pending before it against a person, the superintendence of whose property has been assumed by the Court of Wards, until the plaintiff has filed a certificate that the claim has been notified in accordance with section 26 of the Act. It is not within the province of a Civil Court to determine whether the Deputy Commissioner should or should not have granted a certificate ... 6

## PUNJAB LAND REVENUE ACT, 1887.

Section 158 (1) of the Punjab Land Revenue Act prevents a Civil Court from taking cognizance of a claim for land in addition to that allowed in partition proceedings.

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## PUNJAB LAWS ACT, 1872.

(1) *Punjab Laws Act, 1872—Punjab Pre-emption Act, II of 1905—“Agricultural tribes”*—*Lis pendens*.—K. D. sold the land in suit to M. B. Separate suits for pre-emption were brought by K. B. and A. B. on 22nd October, 1902, and summonses were served on 24th October for 7th November. On 29th October M. K. filed a suit for pre-emption, and on 7th November obtained from M. B., vendee, a deed of sale of the land for the full price mentioned in the previous sale-deed. M. D. then allowed his own suit to go by default and was made defendant in the other two suits.



The references are to the Nos. given to the cases in the "Record."

Nos.

PUNJAB LAWS ACT, 1872—*concl'd.*

*Held—*

(i) that, inasmuch as K. B. belonged to the *Kureshi* tribe, which was not notified as an agricultural tribe under Act XIII of 1901, until 1904, he had no right of pre-emption at all at time of suit, and, therefore, his suit must fail ;

(ii) that A. B. and M. K. must share the bargain, neither being in the circumstances in a better position than the other, inasmuch as (a) A. B.'s suing a week earlier than M. K. does not amount to "superior diligence"; (b) A. B. and M. K. had, under pre-emption law, equal rights *ab initio*; (c) M. K.'s not obtaining a decree but taking a transfer out of Court instead, does not tell against him; (d) M. K.'s purchase, being *pendente lite*, does not operate to put him in a better position than A. B.

*Parma Nand v. Ghulam Fatima* (15 P. R. 1905) followed, *Mahmud Khan v. Khuda Bakhsh* (26 P. R. 1908) explained; *Narain Singh v. Purbat Singh*, (1901) I. L. R. 23 All. 247, distinguished. ... 7

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Suit for possession by collaterals after the death of widow but more than 12 years after the alienation by the last male owner.

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PUNJAB LOANS LIMITATION ACT, 1904.

*The Punjab Loans Limitation Act, I of 1904, Article 57—Applicability of—Transfer of liability for debt.*—On 31st March 1902, one Mussamat M., guardian of certain minors, sold property to G. A. K., deceased husband of defendant, for Rs. 363-8-0, being part of the amount due by the minors to plaintiff, the purchaser undertook to pay the said sum to plaintiff and the plaintiff agreed to look to him for it. The deed of sale was deposited with plaintiff. On 18th February 1908 plaintiff brought a suit against the widow of G. A. K. for recovery of the debt and was met with a plea of limitation. The

*The references are to the Nos. given to the cases in the "Record."*

Nos.

### PUNJAB LOANS LIMITATION ACT, 1904—*concl'd.*

first Court held the suit fell under Article 59 or 61 and decreed the claim. The Divisional Judge on appeal confirmed the decree but held that Article 59 applied. The Chief Court on revision—

*Held*, that the case was one of mere transfer from one person to another of liability for a debt, G. A. K. having stepped into the shoes of the minors to whom money had been lent, and that Article 57, as amended by the Punjab Loans Limitation Act, 1904, applied ("money payable for money lent").

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### PUNJAB MUNICIPAL ACT, 1891.

*Punjab Municipal Act, XX of 1891, section 42 (1) (A) (a) (i)—gross annual rent includes house-tax payable by tenant to landlord—Held*, that when Municipal taxes on a house at Simla payable by the landlord, are, by contract between landlord and tenant, payable by the latter to the former as part of the consideration for occupation, the sum so payable must be included in assessing the gross annual rent or annual value, on which the Municipal Committee is entitled to levy a house tax under section 42 (1) (A) (a) (i) of the Punjab Municipal Act, 1891, irrespective of the terms in which that sum is described in the contract.

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### PUNJAB PRE-EMPTION ACT, 1905.

(1) Section 11—A person belonging to tribe not notified as an agricultural tribe under Act XIII of 1891 at the time of suit, though subsequently notified, has no right of pre-emption at all.

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(2) *Punjab Pre-emption Act, II of 1905, section 11 and proviso—Aroras of Multan not a sub-division of Khatri tribe—Onus probandi—Held*, that plaintiff on whom the onus lay had failed to prove that Aroras of the Multan District are a sub-division of Khatries and members of the same tribe within the meaning of the proviso to section 11 of the Punjab Pre-emption Act, 1905

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(3) *Punjab Pre-emption Act, II of 1905, section 3, sub-section (2)—Village immoveable property.—I. D. sold a house situate in the abadi, known as Parao Lala Musa to D. D.—M. A., (I. D.'s son) sued for pre-emption alleging that the abadi was part of a "village." It appeared that many years ago Government established a halting ground or parao in the immediate vicinity and constructed a number of shops. Since then the bazar had grown and a number of houses were built close by and at time of suit this abadi contained 143 residential houses and 110 shops. The land occupied by the parao belonged to mauza Dhaman and the abadi or bazar included land within the limits of that village, as well as of the village of Said Gul. It was contended that the house was not "village immoveable property" nor subject to pre-emption inasmuch as the abadi Parao Lala Musa lay at a distance from what was generally known as the abadi of mauza Dhaman and Said Gul.*

*The references are to the Nos. given to the cases in the "Record."*

Nos.

**PUNJAB PRE-EMPTION ACT, 1905—concl'd.**

*Held* by the Division Bench, that if extensions are made to the existing *abadi* of a village or if a hitherto unoccupied site within the boundaries of the village is built over and settled upon, such new buildings would become "village immoveable property".

*Held* by Ryves, J. that the word "village" in section 3, sub-section (2), Punjab Pre-emption Act, II of 1905, does not mean a collection of houses but means the whole estate or *manza* and includes everything within the boundaries of the village area.

*Held* also by Ryves, J. (Scott-Smith, J., dissenting) that the definition in this sub-section applies to all immoveable property within the limits of a village.

*Held* by Scott-Smith, J., that the expression "village site" in the above sub-section could not be considered synonymous with "village" or "estate" but meant the inhabited part of the village or "*abadi deh*."

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(1) Under section 38 of the Punjab Tenancy Act, 1887, the occupancy rights of minors are not lost if they fail to manage the cultivation during minority.

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*Receiver—appointment of—Civil Procedure Code, Act V of 1908, Order XL, rule 1—Appeal from order refusing to make appointment—Discretionary power of First Court not lightly interfered with by Appellate Court—Receiver not to be appointed on mere apprehension of waste.—Held* on the authorities cited, that an appeal lies from an order refusing to appoint a receiver under Civil Procedure Code, 1908, Order XL, rule 1.



*The references are to the Nos. given to the cases in the "Record."*

Nos.

RECEIVER—*concl'd.*

*Held also*, that the exercise of the jurisdiction to appoint a receiver is not a matter *ex debito justitiæ*, and it is for the Court, to which the application is made, to decide in its discretion, whether or not it will act upon that application, and the Appellate Court should not interfere with the opinion of the First Court unless it finds such opinion to be either arbitrary, vague or fanciful.

*Held further*, that a receiver should not be appointed, when the application is based, not upon any specific allegation of misconduct, but upon a mere apprehension that the defendant, though he has done nothing in the past, will after the institution of the suit forthwith proceed to waste the property, and that this principle is applicable also to the case where one of three Hindu brothers seeks partition of the joint family property. ... ..

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(1) *Chief Court's powers of revision under section 70 (1), Punjab Courts Act*—"Material irregularity"—*Right to possession of shamilat by a co-sharer therein.*—In 1883, in consequence of a dispute between plaintiff who was in possession of a plot of *shamilat abadi* and an outsider, the former executed an agreement admitting that the plot belonged to the community, and that he held subject to their good pleasure.

In 1908, four of the proprietors out of several hundreds, dispossessed him, and he sued them for possession. Lower Appellate Court held, that his only remedy was a suit against the whole community for partition, and dismissed the suit—

*Held—*

(i) that the suit should have been decreed, inasmuch as the possession of plaintiff under the agreement of 1883 was a substantive right, interference with which by four of the proprietors gave him a cause of action against them; and

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*Held also, that before it could be held that the Munsiff had not pecuniary jurisdiction to entertain an application for execution and to conduct execution proceedings, it was for the applicant to prove that the amount of the decree sought to be executed exceeded Rs. 1,000 and this could obviously not be done when the decree was fictitious.*

*Held further, that a Munsiff before whose Court an application for execution of a decree is presented, has power to decide whether or not the decree sought to be executed was a genuine one and his proceedings are not ab initio void, because he finds that there is no such decree in existence.*

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## CRIMINAL PROCEDURE CODE, 1898—*contd.*

Thereupon the *thana* clerk gave him a note authorising him to take suspected persons to the *thanadar* who was in a neighbouring village. On the constable attempting to arrest the suspected persons, he was assaulted by the accused who knew him to be a Police constable. Neither the note nor the clerk was produced in evidence. On conviction an objection based on section 99, explanation 2 of the Indian Penal Code, was raised. On revision the Chief Court—

*Held*, that under section 54 of the Code of Criminal Procedure, 1898 a Police officer investigating a charge of burglary was empowered to arrest without an order from a Magistrate or a warrant any person against whom he had a reasonable suspicion of having been concerned in the burglary and that accused had consequently been rightly convicted under section 332, Indian Penal Code ... 18

(5) *Criminal Procedure Code, Act V of 1898, sections 75 and 537—Gambling Act, III of 1867, section 5—Search warrant signed by Magistrate outside the local limits of his jurisdiction, issued without affixing Court's seal—Illegal warrant.*—(On a search warrant issued by a Magistrate of the first class under section 5 of the Gambling Act, 1867, the Police raided the house of G, and he and others found in the house at the time were sent up for trial by the Police. The defence raised two objections to the legality of the search warrant—

- (1) that the seal of the Magistrate's Court was not affixed to it, and
- (2) that the warrant was signed by the Magistrate at a place outside the local limits of his jurisdiction,

The Magistrate, however, convicted the accused under sections 3 and 4 of the Gambling Act. On appeal the conviction was upheld. The Chief Court on revision—

*Held*, that the omission to affix the seal of the Court on the search warrant was a mere irregularity cured by section 537 of the Criminal Procedure Code, 1898, but that the search warrant having been signed by the Magistrate at a place outside the local limits of his jurisdiction was illegal.

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(6) *Criminal Procedure Code, Act V of 1898, section 110—Accused entitled to independent examination of his case—Accused cannot be convicted on facts against him older than his previous security bond.*—*Held*, that in cases under section 110 of the Criminal Procedure Code, 1898, each accused is entitled to an entirely independent examination of his own case, and if the accused has been bound down before, his conduct before the date of the previous bond cannot be imported into the subsequent case and made a ground for fresh proceedings. ... 4

(7) *Criminal Procedure Code, Act V of 1898, section 121—Forfeiture of bond for good behaviour.*—*Held*, that section 121 of the Criminal Procedure Code, 1898 is explicit and it is so far, as concerns bonds for

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(8) *Criminal Procedure Code, Act V of 1898, sections 110 and 121—*forfeiture of security bond where offence committed in Native State.—Where a person placed on security under section 110, Criminal Procedure Code, 1898, committed within the period of his security bond an offence in a Native State against a subject of the King-Emperor—

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*Held*, that the procedure adopted by the District Magistrate was not that laid down in section 123 of the Code of Criminal Procedure, 1898.

*Held* also, that it was the duty of the Sessions Judge in the case of a reference under section 123 of the Code of Criminal Procedure to consider the evidence produced and to pass orders after doing so.

*Held* further, that there being no evidence to show that since his last conviction the accused had done anything that would justify an order under section 110 of the Criminal Procedure Code, security should not have been demanded from him. ... 29

(10) *Criminal Procedure Code, 1898, section 195 (1) (a)—False complaint to Police—Sanction for prosecution by District Magistrate—Police Act, V of 1861, section 4.—Held*, that sanction for prosecution for making a false complaint to the police may, under section 195 (1) (a), Criminal Procedure Code, be granted by the District Magistrate, who exercises general control over, and direction of the police in his district under section 4 of the Police Act, V of 1861.

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(12) *Criminal Procedure Code, Act V of 1898, section 250—Prosecution instituted by District Judge on the report of process-server—Acquittal of accused—Liability of process-server to pay compensation.—Held following Bharut Chander Nath v. Jaded Ali Biswas, (1892) I. L. R. 20 Cal. 481 and In the matter of the petition of Ram Padarath, (1904) I. L. R. 26 All. 183, that a process-server, on whose report that the accused had obstructed him while executing a warrant for custody of a wife, the District Judge instituted criminal proceedings against the accused, is not a person upon whose complaint or information the accusation was made and is not liable to pay compensation under section 250 of the Code of Criminal Procedure* ... 25

(13) *Criminal Procedure Code, Act V of 1898, section 250—Compensation to accused when case compromised.—Where S. S. prosecuted L. S. under sections 323 and 448, Indian Penal Code, and, though summons had not been served on him, L. S. appeared and a compromise was filed and accepted, but the Magistrate subsequently cancelled the order accepting the compromise discharged the accused and awarded L. S. Rs. 15 as compensation—*

*Held by the Chief Court on the case being reported by the Sessions Judge, that to justify the award of compensation under section 250, Criminal Procedure Code, the Magistrate must himself acquit the accused, but where a case is compounded the composition itself has the effect of an acquittal and compensation cannot legally be awarded* ... 30

(14) *Criminal Procedure Code, Act V of 1898, sections 296 and 403—Indian Penal Code, Act XLV of 1860, sections 182 and 211—Acquittal of accused of an offence under section 182 no bar to the trial for an offence under section 211.—T. S. reported to the police that C. P. had cut some reeds belonging to Government. The police after enquiry found the information given was false and sent up T. S. for trial under section 182, Indian Penal Code. At the same time C. P. filed a complaint under section 211, Indian Penal Code, against the same accused which was sent for trial to the same Magistrate. The Magistrate took the evidence sent up by the police in the section 182 case and acquitted the accused without calling upon C. P., the complainant, to produce his evidence in the section 211 case. The complainant filed a revision in the Court of the District Magistrate who ordered a trial of the case under section 211, on the ground that it did not appear that the charge under this section had been investigated. On revision by the accused to the Chief Court—*

*Held, that the acquittal on the charge under section 182, Penal Code was no bar to the subsequent trial of the offence under section 211, inasmuch as the offences under these sections are essentially distinct and sections 236 and 403, Criminal Procedure Code, had no application, there being no question of doubt as to which of the offences had been committed, and there could have been no charge in the alternative.* ... 20

(15) Section 439. Criminal revision by Chief Court against charges framed by a Magistrate.

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CRIMINAL PROCEDURE CODE—*concl'd.*

(16) *Criminal Procedure Code, 1898—Transfer of cases by District Magistrate of his own motion—Section 528—Notice to parties before transfer—Section 190 (b), Police Report—Grounds on which a superior Court should transfer a case on application by a party.*—The police, acting under section 2, Criminal Procedure Code, reported to a Sub-Divisional Magistrate, that they had arrested a gang of men under section 151, Criminal Procedure Code. The Sub-Divisional Magistrate ordered *chalan* under section 143, Indian Penal Code, and the police obeyed. The accused, after some witnesses had been heard by the Sub-Divisional Magistrate, applied to the District Magistrate for transfer of the case to some other Court. The District Magistrate rejected the application but suggested trial by the Tahsildar, within whose power the case was. The Sub-Divisional Magistrate, then, finding his own work heavy, transferred the case to Tahsildar, but before the first hearing the District Magistrate ordered re-transfer to Sub-Divisional Magistrate, giving no reasons. The Sessions Judge refused to interfere. On accused coming to Chief Court with a petition that the case be heard by the Tahsildar, *held*, that there was no reason to interfere because—

- (i) The Sub-Divisional Magistrate in ordering *chalan* was acting not under section 190 (c), Criminal Procedure Code, but under section 190 (b) ;
- (ii) Therefore he was not bound to give accused any option as to the Court they should be tried by ;
- (iii) No notice by District Magistrate to the accused was necessary before passing his order of transfer to Sub-Divisional Magistrate ;
- (iv) Though section 528 (3) requires District Magistrate to give reasons for transfer, the absence of any statement of reasons cannot properly result in mere cancellation of the order.

28 P. R. 1902, Cr. (*Bakhsha v. Tahlu Ram*) distinguished ; *Queen-Empress v. Kuppū Mathu Pillai* (1901) I. L. R. 24 Mad. 317 approved ; *Imperatrix v. Sadashiv Narayan Joshi*, (1898) I. L. R. 22 Bom. 549, distinguished      ...      ...      ...      ...      ...

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CRIMINAL REVISION.

*Criminal Revision by Chief Court against charges framed by a Magistrate—Criminal Procedure Code, 1898, section 439—Matters previously adjudicated in Civil Court—Proper attitude of Criminal Courts where matter is more appropriate for decision by a Civil Court.*—*Held*, dissenting from *Charoobala Labee v. Barendra Nath Mozamdar*, (1900) I. L. R. 27 Cal. 126, and distinguishing 45 P. R. 1885, Cr. (*Azim Khan v. Empress*) that the Chief Court can as a Court of revision under section 439 of the Code of Criminal Procedure, 1898, interfere with the order of a Magistrate charging an accused person with an offence although that order is not appealable.

*Held* also, that save for very exceptional reasons a Criminal Court should not go behind the finding of a Civil Court and convict of cheating and fraud a person, who upon the very same facts has succeeded in satisfying a Civil Court upon the merits of the case of the justice of his claim.

*The references are to the Nos. given to the cases in the "Record."*

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CRIMINAL REVISION—*concl'd.*

*Held* further, that it is a very sound general principle and one to be observed by all Magistrates that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court

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## D

## DEFAMATION.

*Defamation—Indian Penal Code, Act XLV of 1860, section 499—Communication to complainant's pleader—"publication."*—Accused in reply to a notice from complainant's pleader, calling upon him to pay money lent to him by complainant, wrote a letter to the pleader containing defamatory statements about the complainant. The complainant thereupon charged the accused with defamation. The lower Courts held that the letter having been sent to the complainant's pleader must be considered to have been addressed to the complainant himself and therefore there was no publication to a third person. On revision to the Chief Court:—

*Held*, that as the defamatory statements contained in the accused's letter to the complainant's pleader were wholly irrelevant to, and unconnected with, the question of the alleged loan mentioned in the pleader's letter, the pleader must be held to be a third person as far as these statements are concerned, and that therefore there had been publication within the purview of section 499 of the Indian Penal Code.

10

## DISOBEDIENCE

Of order of Civil Court for production or inspection of documents, no longer criminal offence under Order XI, rule 21 of new Civil Procedure Code.

See *Civil Procedure Code*, 1882...

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## DISTRICT MAGISTRATE.

Though section 528 (3) of Criminal Procedure Code requires District Magistrate to give reasons for transfer, the absence of any statement of reasons cannot properly result in mere cancellation of the order.

See *Criminal Procedure Code* (16)

3

## E

## EXCISE ACT, 1896.

(1) *The Excise Act, XII of 1896, sections 3 (1) (n). 51 and 52—applicability of—licensee in possession of liquor in excess of amount specified in his license.*—*Held*, that a licensee may possess liquor in excess of the amount specified in section 3 (1) (n) of the Excise Act, 1896, and up to the amount specified in his license or pass and that, if he is in possession of more than the latter quantity, he is punishable under section 51 of the Act which applies to "any person," section

*The references are to the Nos. given to the cases in the "Record"*

EXCISE ACT, 1896—*concl'd.*

Nos.

52 of the Act providing a penalty for certain offences not punishable by section 51, the words "for the breach of which rule or condition" "no other penalty is hereby provided" being clear and meaning, that section 52 does not apply to cases for which a penalty is provided by some other part of the Act. ... 21

(2) *Excise Act, XII of 1896 - Police officer invested with powers under section 44 not competent to lay complaint under section 57.*—Held, following 9 P. R. 1897 (*Piraj v. Queen-Empress*) that Police officers invested with powers under section 44 of the Excise Act, 1896, can only be treated as Excise officers for the purposes of sections 36, 37 and 38, and consequently a Police officer so empowered is not an Excise officer within the meaning of section 57, competent to make a complaint or report of an offence punishable under section 49 or 52 ... 13

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*The Indian Arms Act, XI of 1878, sections 4 and 19*—*Lead moulded into bullets - Ammunition.*—Held, that the definition of "ammunition" in the Indian Arms Act, 1878 (section 4) is not exhaustive, and that the question whether an article comes within the description of the Act is one of fact to be determined according to circumstances, and that lead moulded into bullets of about 20 to 24 bore is "ammunition" and is not excluded from the definition of the word "Ammunition" in the Act ... 16



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## INDIAN EVIDENCE ACT.

*Act I of 1872—Indian Evidence Act, section 30—Confession—Admissibility against co-accused—Retracted confession—Conviction on confession alone.*—Where three persons were charged with murder and one of them made a detailed statement to the police which he soon after repeated before the committing Magistrate during the trial, in which statements he alleged that the other two had committed the murder and compelled his assistance by force and threats of death and moreover made out that he had taken a very minor part (under threats of death) in the commission of the crime—

*Held* by the Chief Court on appeal, that this was in no sense a confession for the purposes of section 30, Indian Evidence Act, and could not be used against the co-accused.

*Held* also, that the so-called confession having been retracted in the Sessions Court and there being no other evidence against the alleged confessing accused he was entitled to an acquittal. ... 24

## INDIAN EXPLOSIVES ACT, 1884.

*The Indian Explosives Act, IV of 1884—"Patakhas"—license.*—*Held*, that no license for the manufacture or sale of "Patakhas" is required under the Indian Explosives Act, 1884 ... 8

## INDIAN PENAL CODE.

### (1) Section 99, explanation 2 and section 332.

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### (2) Offences under sections 182 and 211 of the Indian Penal Code are essentially distinct.

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(3) *Indian Penal Code, Act XLV of 1860, section 294 A—Meaning of keeping an office for "purpose of drawing a lottery" and of the word "lottery."*—*Held*, that the words "any office or place for the purpose of drawing any lottery" in section 294 A of the Indian Penal Code mean an office or place intended to be the scene of the actual drawing of the lottery and do not include an office or place kept only for the correspondence and other work connected with a lottery advertised "as going to be in some public place to be selected later on."

*Held* also, that where the agreement was that "every subscriber pays Rs. 10-8 and gets a bond for Rs. 10. This sum is guaranteed by one of seven banks, and not only is negotiable but can be cashed at the bank at par at any time.—The draws were (*sic.*) to start when 2,000 tickets had been sold, and at stated intervals further drawings were to be made until every one had got a prize or had had their (*sic.*) money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize or decided to withdraw their money. Thus the original ten rupees was absolutely safe, the extra eight annas

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INDIAN PENAL CODE—*concl'd.*

"was to cover the cost of correspondence, etc." This was a scheme for the distribution of prizes by lot or chance, and consequently came within the meaning of the word "lottery" as used in section 294 A, and that accused were, therefore, guilty of an offence under the second part of this section. ... .. 17

(4) *Indian Penal Code, Act XLV of 1860, sections 239 and 341—Wrongful restraint.*—The complainants charged the six accused with wrongful restraint in that they had prevented complainants from passing through certain fields over which, complainants alleged, they had a right of way to their well. The Magistrate convicted under section 341. The convictions were affirmed on appeal.

*Held*, following 25 P. R. 1886, Cr. (*Haveli v. The Empress*) that the accused could not be convicted of an offence under section 341, Indian Penal Code, inasmuch as—

(1) complainants' right of way was not sufficiently established ;

(2) it was not shown that accused acted otherwise than *bonâ fide* in obstructing them, an act which fell within the exception to section 339, Indian Penal Code. ... .. 22

(5) Sections 420, 467 and 468.

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(6) *Penal Code, Act LXV of 1860, section 498—Enticing away married woman—Complaint—Criminal Procedure Code, Act V of 1898, sections 4 (h) and 199—Report of Police officer—Held*, following 4 P. R. 1888, Cr. (*Jit Mal v. Empress*), *Tara Prasad Laha v. Emperor*, (1903) I. L. R. 30 Cal. 910 F. B., and *Emperor v. Isap Mahomed*, (1907) I. L. R. 31 Bom. 218, that the report of a Police officer is not a complaint within the terms of sections 199 and 4 (h) of the Code of Criminal Procedure, and that a conviction under section 498, Indian Penal Code, where there has been no complaint to the Magistrate by the husband or guardian, is not maintainable. ... .. 32

(7) *Section 499—Communication to complainant's pleader containing defamatory statements—publication.*

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INDIAN RAILWAYS ACT.

*The Indian Railways Act, IX of 1890, sections 102, 108, 109 (2) and 120 (c)—forcible ejection of passenger.*—N. D. holding a 3rd class ticket was travelling in an intermediate carriage. At Ambala the accused, three Railway officials not then on duty and a Railway Police constable, attempted to seat some passengers in the compartment in which N. D. was travelling. N. D. remonstrated alleging that the compartment was already over-crowded. N. D. either got out or was dragged out and a scuffle ensued between him and accused. On complaint the Magistrate convicted accused of an assault, finding at the same time that the compartment had not at the time its full complement of authorized passengers.

The references are to the Nos. given to the cases in the "Record."

Nos.

## INDIAN RAILWAYS ACT—*concl'd.*

*Held* by the Chief Court on the case being reported to it under section 438, Criminal Procedure Code, that N. D. had committed offences under sections 109 (2) and 120 (c) of the Railway Act and was liable to removal by any Railway servant and that accused were entitled to an acquittal.

*Held* also, that the word passenger in the Railway Act includes a ticket-holder even before he has boarded the train. ... .. 26

## J

## JUDICIAL PROCEEDINGS.

Judicial proceedings for the purposes of the Criminal Procedure Code are any proceedings, in the course of which the presiding Judge may, under any circumstances, legally take evidence on oath (*vide* section 4, clause (m) of the Criminal Procedure Code).

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## JURISDICTION.

(1) *Jurisdiction—Criminal Procedure Code, 1898, section 179—Criminal misappropriation in respect of goods sent from Delhi to Calcutta for sale.*—Where the complainant's case was that he despatched goods from Delhi to the accused at Calcutta for sale on commission and that the accused mortgaged the goods and appropriated the money to their own use, and a complaint was made at Delhi under sections 403 and 409, Indian Penal Code—

*Held* following *Chint Singh v. Crown*, 67 P. L. R. 1901, that the alleged offences were complete as soon as the money had been misappropriated, and as this was alleged to have been done at Calcutta, the Calcutta Courts alone had jurisdiction, and the fact that the money should have been and was not sent to Delhi, did not give the Delhi Court jurisdiction.

*Held* also, that a Court, which has not jurisdiction to *try*, has not jurisdiction to *acquit* the accused, and the proper order was one of discharge. ... .. 7

(2) *Jurisdiction—Magistrate convicting of a minor offence where a more serious offence had really been committed—Indian Penal Code, Act XLV of 1860, sections 420, 467 and 468.*—The complaint was that L. had forged a hundi. The case was tried by a first class Magistrate not exercising enhanced powers, who, finding that the forgery had been committed, framed charges under sections 420 and 468 of the Indian Penal Code and convicted L. on those charges.

*Held*, that the document in question being a valuable security, the offence if committed was one falling under section 467, and that such a case being triable only by a Court of Sessions, could not be disposed of by a Magistrate of the first class not exercising enhanced powers otherwise than by an order of discharge or by committal to Sessions, the Magistrate having no power to assume further jurisdiction by framing charges of minor offences included in the major offence. ... 31



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JURISDICTION—*concl'd.*

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- (3) *Jurisdiction—Frontier Crimes Regulation, III of 1901, Section 59—Criminal Procedure Code, Act V of 1898—trial of a person under the Regulation without assistance of Council of Elders—Course of appeal.—Held, that where a Magistrate empowered by section 59 of the Frontier Crimes Regulation, III of 1901, tries without the assistance of a Council of Elders a person charged with having done an act punishable under the Regulation, the ordinary course of appeal prescribed by the Code of Criminal Procedure (Act V of 1898) applies. ... 19*
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- (6) *Jurisdiction—Offence under Act XIII of 1859—place of trial.—Held, following 17 F. R. 1896, Cr. (Mana Lal v. Nahia) that proceedings under Act XIII of 1859 can be instituted either in the Court of the Magistrate within the limits of whose local jurisdiction the defendant resides or in a Court within whose local limits the refusal to perform the contract has taken place, but not in a Court within whose local limits the contract was made. ... .. 12*

L

LEGAL PRACTITIONERS ACT.

*Legal Practitioners Act, XVIII of 1879, section 13 (c) and (d)—fee paid or payable—procuring employment—deception—ratification.—Where the facts found were that during the absence from the station of A. A., an advocate, his clerk, F. C., took a litigant J. S., who wished to file a suit and had come to retain P. C., to A., a Pleader, and told J. S. that A. was competent and would conduct the case well, that J. S. paid A. Rs. 60 as his fee and that the latter then asked for and received Rs. 6 further as *munshiana* out of which A., paid Rs. 3 to F. C. and retained Rs. 3 for his own clerk.*

*Held by the Full Bench, that the Rs. 3 paid by A. to F. C. were not paid out of a fee paid or payable to A. for his services within the terms of section 13 (c), Legal Practitioners Act, XVIII of 1879, and that the case did not fall within section 13 (d) of the said Act inasmuch as there was no evidence of procuring or attempt to procure employment as Pleader or that J. S. had been deceived or had any misrepresentation made to him.*

On return to the Division Bench (Johnston and Williams, JJ.). *Held* that in section 13 (c) of Act XVIII of 1879 the words "out of any fee" qualify only the words "consents to the retention of" and do not qualify "tenders" or "give" and that A. was guilty of misconduct under clause (c), section 13 aforesaid, in that he gave F. C. Rs. 3 as a gratification for having procured him a client... ..

...27 F.B.

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PUNJAB MUNICIPAL ACT, 1891.

*Punjab Municipal Act, XX of 1891, sections 42 (1) (f) and 201—Imposition of tax on the goods stored at a place originally outside the octroi zone and brought subsequently within it—Duty of Magistrate to enquire whether tax is intra vires before acting under section 201.—Held, that a Municipal Committee is not competent to levy octroi upon goods which were originally brought to a place outside the octroi limits and remained there after the octroi limits had been extended, so as to bring the place within the octroi zone, as such goods cannot be said to have been brought within the octroi limits within the meaning of section 42 (1) (f) of the Punjab Municipal Act, 1891.*

*Held also, that it is the duty of a Magistrate to whom an application is made on behalf of a Committee under section 201 of the Punjab Municipal Act, 1891, to see that on the facts, as stated by the claimant, the amount is claimable, i.e., whether the claim is intra vires or ultra vires, and if he finds that the sum claimed is beyond the power (i.e., ultra vires) of that Committee he is bound to refuse the application* ... .. 2

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*Act XIII of 1859, section 2—applicability of, to advance made to workman by way of loan—Construction of Act.—Held, that the provisions of Act XIII of 1859 can only apply to the case of a workman who has received an advance of money on account of work, which he has contracted to perform; and they do not apply to a case in which the workman has only received a loan from his employer, without any reference to his wages for the work which he has agreed to perform—Also, that the Act, being of a penal nature, has to be construed strictly.*

*Ram Prasad v. Dirgpal, (1881) 1 L. R. 3 All. 744 and Queen-Empress v. Rajab, (1892) 1 L.R. 16 Bom. 368 followed ... .. 9*

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REVENUE JUDGMENTS,  
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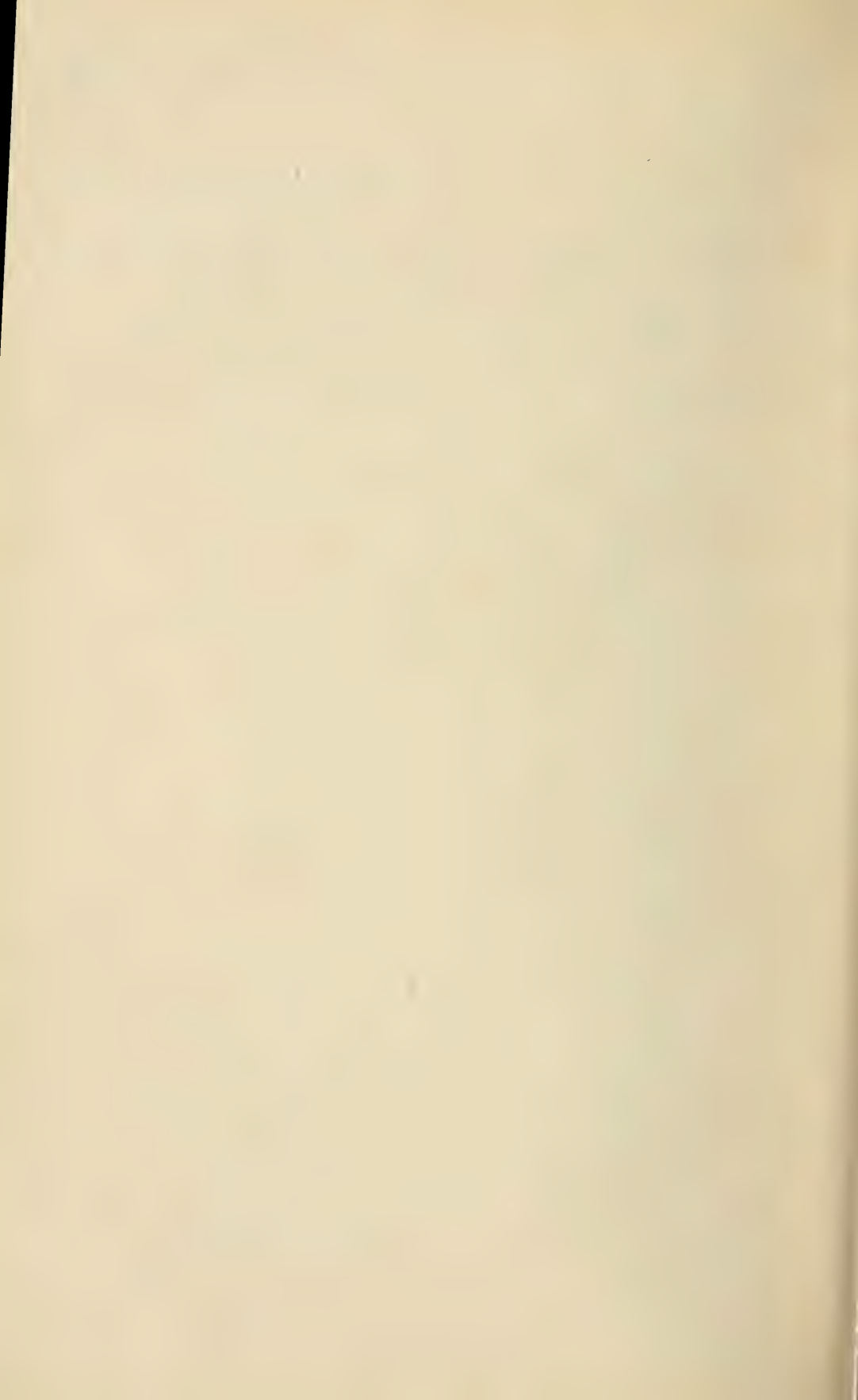
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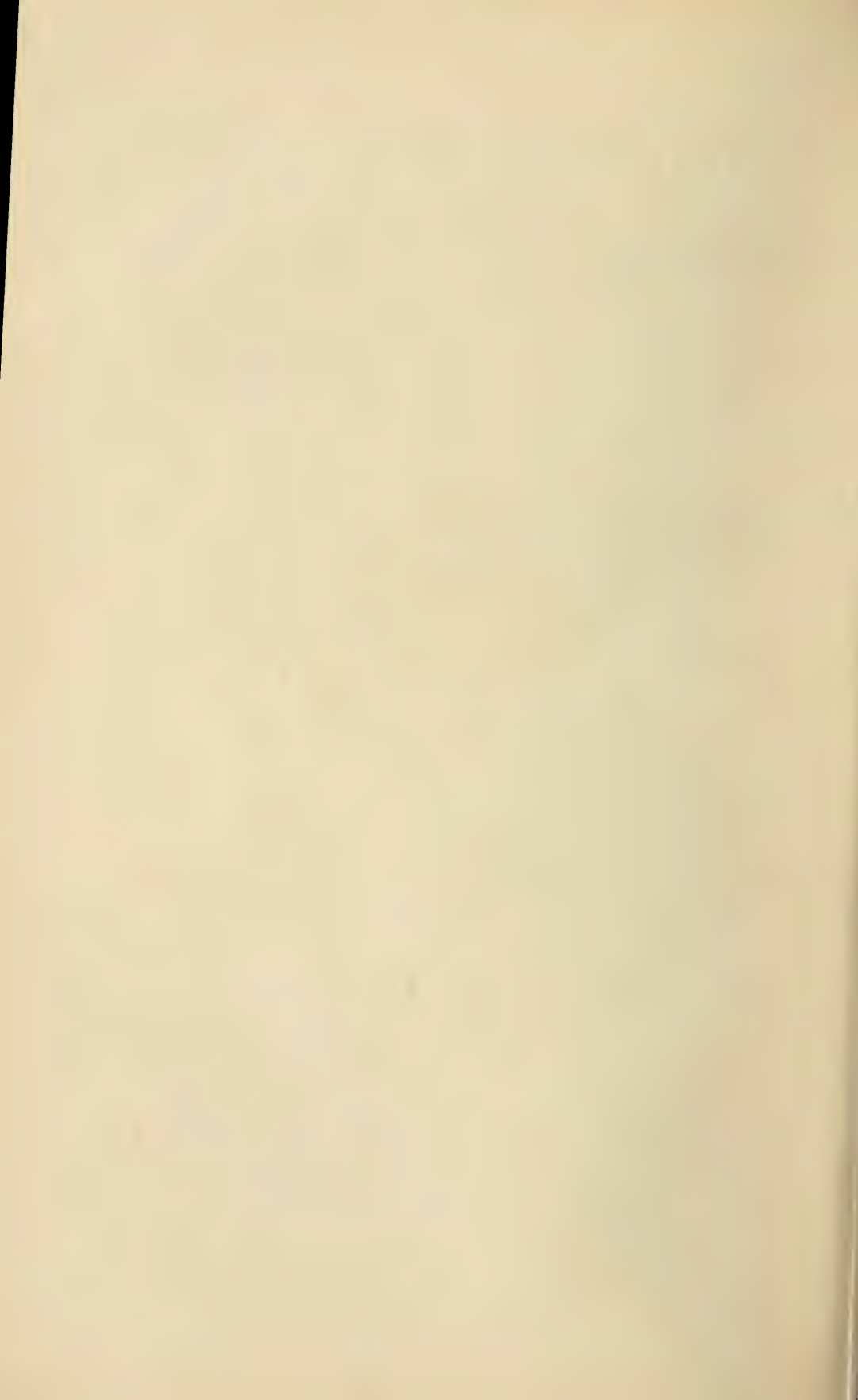




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*The references are to the Nos. given to the cases in the "Record."*

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*Held* also, overruling 4 P. R. 1900 Rev. (*Prem Singh v. Jamit Singh*) that section 60 of the Punjab Tenancy Act, 1887, makes transfers under any section of Chapter V including section 59 (3), "voidable at the instance of the landlord" who alone can enforce his rights in the Revenue Court by bringing a suit under section 77 (3) (h) of the Punjab Tenancy Act, and that a reversioner of the widow's deceased husband cannot be added as a plaintiff as he is not a landlord. He has his remedy in a Civil Court if the landlord takes no action or the widow abandons the land ... .. 3

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CIVIL JUDGMENTS,  
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# Chief Court of the Punjab.

## CIVIL JUDGMENTS.

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No. 1.

*Before the Hon'ble Mr. Justice Johnstone.*

MUSSAMMAT MAYA,—(PLAINTIFF),—APPELLANT,

*Versus*

GURDIT SINGH AND OTHERS,—(DEFENDANTS),—  
RESPONDENTS.

Civil Appeal No. 448 of 1908.

*Custom—Succession—Hindu Law—Brahmins of mauza Mankial  
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*Held*, that apart from local and special circumstances and conditions, the initial presumption in regard to Brahmins is, that they are governed by Hindu Law, and that the defendants, on whom the *onus probandi* rested, have failed to prove that Brahmins of *mauza Mankiala, tahsil Gujar Khan*, district Rawalpindi follow agricultural custom in matters of succession.

*Further Appeal from the decree of T. J. Kennedy, Esquire,  
Divisional Judge, Rawalpindi Division, dated the 16th  
April 1908.*

Nanak Chand, for appellant.

Duni Chand, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—The parties to this suit are Brahmins of *21st June 1909.*  
*Mankiala, tahsil Gujar Khan, district Rawalpindi.* Nihal Singh, deceased, was the last male holder of the land in suit. Plaintiff is his daughter (married), two defendants are his brother's sons, and three are his granddaughters, whose fathers are dead. Defendants are in possession of the land, and plaintiff claims it as lawful heiress ; and thus the question at issue really is whether the family follows Hindu Law or agricultural custom.

The first Court framed the issues in an unsatisfactory way, but I do not think the parties were really prejudiced thereby. It found that custom governed the case and so dismissed the plaintiff's suit; and the learned Divisional Judge adopted the same view.

The revision under clause (b), section 70 (1), Punjab Courts Act, was admitted as an appeal, and it has been duly argued before me. Much depends upon the imposition of the burden of proof. If the defendants should bear that burden, then the suit should, in my opinion, be decreed; for there is on the record no positive proof that these Brahmins actually follow custom.

To determine the presumption that should be made in the case, we must consider (a) the conditions under which these Brahmins live, (b) the relevant rulings. As regards (a) I single out these circumstances—they do actually cultivate the land, at least through servants (*khudkash*); they have been in possession of the land for some few generations; but, on the other hand, they follow other pursuits besides agriculture (the whole land of the clan amounting only to 50 acres, it is said)—see statement of Gurdit Singh, defendant himself; and they do not form a compact village community, but are merely a few landowners. So far, in my opinion, there is no presumption in favour of custom as against personal law. The initial presumption as to Brahmins as such, apart from circumstances and conditions, is in favour of personal law.

I have been referred to several rulings which I will now consider in chronological order. The first is *Mussammatt Sada Kaur v. Ram Singh* <sup>(1)</sup>, Brahmins of Ambitsar. I do not think it helps much here. The Brahmins there were described as agricultural Brahmins, but the question was not whether in a general sense they followed Hindu Law or custom. It was held that, because no special custom was proved as to succession to an adopted son dying sonless, the Court must fall back on Hindu Law. Stress was laid upon the parties belonging to a *primarily* non-agricultural tribe.

*Gopal Singh v. Sukha Singh* <sup>(2)</sup> is a case of Sikh Brahmins of *tehsil Jagadhri* who have abandoned the *janeo*, do not perform priestly functions, have for generations followed agriculture, and are mainly dependent on agriculture, and the finding was that they are to be presumed to follow custom. Of

<sup>(1)</sup> 21 P. R. 1880.

<sup>(2)</sup> 56 P. R. 1906.

these circumstances, the first and last do not obtain in the present case, and another point is that those Sikh Brahmins owned a compact half of the village and held a joint *jagir*.

*Nihal Chand v. Bhagwan Singh* <sup>(1)</sup> is a Bedi Khatri case. The facts are totally different from those before me now, and the judgment is only useful to me as showing the importance of two factors in problems such as we have in this case, namely, (i) whether the main source of livelihood is agriculture; (ii) whether there is a compact village community of the tribe concerned.

In *Gohra v. Hari Ram* <sup>(2)</sup>, an Arora case, much stress is laid upon the fact that the tribe is not *primarily* an agricultural one; and it is said that mere possession by Aroras of land for a few generations in a Muhammadan village (such as the village if Mankiala here is said to be) creates no presumption in favour of the prevalence of custom. Distinction between cases of compact community of the tribe concerned and cases of isolated families or groups of families was also noted.

*Nanak Chand v. Busheshar Nath* <sup>(3)</sup> is quoted as being in favour of defendants, but, in my opinion, it is not so.

The parties were Sarsut Brahmins of Gurdaspur, and in a long and detailed judgment it was held that they followed custom and not personal law. But this was the result of examination of actual practice and custom as proved by instances, and the *onus* was thrown on the party who asserted that agricultural custom was followed. This imposition of the *onus* was fully justified by reasoning, and also by reference to some ten previous rulings of this Court, ending with the Full Bench case *Daya Ram v. Soheli Singh* <sup>(4)</sup>.

*Lachman Das v. Pahla Mal* <sup>(5)</sup> is a case of Brahmins of Amritsar *tahsil*. There, though the tribe had held land as a compact village community for 200 years, it was held that the evidence did not prove that they followed custom.

It might be argued that this ruling goes too far in the direction of favouring Hindu Law, and I am not disposed to lay much stress upon it. It is short, and it is not clear whether the decision was influenced by the existence of positive evidence that Hindu Law was followed.

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<sup>(1)</sup> 33 P. R. 1907.

<sup>(2)</sup> 3 P. R. 1908.

<sup>(3)</sup> 115 P. R. 1907.

<sup>(4)</sup> 110 P. R. 1906, F. B.

<sup>(5)</sup> 59 P. R. 1908.



The next case is a very important one. It is *Hira Nand v. Hari Chand* (1), and the parties were Brahmins of *tahsil* Rawalpindi, which adjoins the *tahsil* to which the present case belongs. There not only was the burden of proof thrown on the apologists of custom, but after a careful examination of the evidence it was ruled that there was no proof of custom.

Lastly, defendants rely on an unpublished ruling (Civil Appeal 1098 of 1906), decided by a Division Bench on 13th January 1907. I have some difficulty in reconciling certain *dicta* in this judgment with previous rulings of the Court, and especially with *Daya Ram v. Soheli Singh* (2) (F. B.), *e. g.*

“ The Lower Courts appear to have started with the wrong assumption, that the parties being Brahmins are governed by Hindu Law unless the contrary is proved. We would reverse the position and say that custom applies in the absence of clear proof to the contrary.”

If this refers to initial presumption,—*i. e.*, to the presumption to be made as regards Brahmins apart from local and special circumstances and facts and conditions—I prefer to follow the better known published rulings quoted in this judgment. But apart from this, the ruling by no means militates against my views. There was a compact and ancient village community in this case, and there were positive indications that custom was followed in practice.

In my opinion, then, the presumption is that these Brahmins follow Hindu Law, because—

- (a) they are not a compact village community ;
- (b) they own only a little land and admittedly depend in part on other occupations for a living ;
- (c) the same result was arrived at in *Hira Nand v. Hari Chand* (1), the case relating to Brahmins living in another village in the same part of the country.

The *onus* being on defendants they have not discharged it.

I accept the appeal, set aside the findings and decrees of the Courts below and give plaintiff a decree for possession of the land in suit with costs in all the Courts.

*Appeal accepted.*

(1) 125 P. R. 1908.

(2) 110 P. R. 1906, F. B.

## No. 2.

*Before the Hon'ble Mr. F. A. Robertson, Officiating Chief Judge, and Hon'ble Mr. Justice Johnstone.*

NABIA,—(PLAINTIFF),—APPELLANT,

*Versus*

MUSSAMMATS FATTO AND RAHMAN,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 931 of 1908.

*Custom—Succession of daughter—Gujars of Ludhiana District—Ancestral property—Will—Appointment of future khana-damad.*

*Held*, that land acquired by pre-emption, the price of which was raised by mortgage of part of ancestral land is not itself ancestral land.

*Held, also*, that it has not been proved that among Musalman Gujars of the Ludhiana District a sonless proprietor has the power to alter the ordinary rule of succession by will, in the sense that he can will ancestral land in absolute ownership to a daughter in presence of near collaterals or that he can by will appoint a future possible husband of his infant daughter to be his *khana-damad*.

*Held*, further, that an unmarried daughter among these Gujars does hold her father's estate until death or marriage.

*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 20th May 1908.*

Rambhaji Datta, for appellant.

Nand Lal, for respondent.

The judgment of the Court was delivered by

JOHNSTONE, J.—The parties to this case are Musalman Gujars 5th July 1909. of the Ludhiana District. The First Court has stated the pleadings at length in its judgment, and we need not repeat them. The contest is between defendant No. 2, minor daughter of the last male holder Muhammadi, and plaintiff who is a collateral of his. Her claim is based upon customary succession and also upon a will of Muhammadi's. Part of the land in suit is a plot of 12 *bighas* 17 *biswas* acquired by Muhammadi by right of pre-emption, the price being raised by the mortgage of some 8 *bighas* out of the ancestral land. The findings of the first Court were—(a) that the pre-empted land is "ancestral" as well as the rest; (b) that the *onus* of proving power to make such a will lay on defendant 2, and has not been discharged; (c) that it has not been proved that plaintiff acquiesced in the will.

The learned Divisional Judge took quite a different view of the case. He held that among these Gujars an unmarried daughter succeeds in preference to collaterals until her marriage; that Muhammadi had "clear power to make a *khana-damad* in his lifetime and equally clear power to do so if he did not live;" that he merely confirmed the succession by the will; that, in these circumstances, it is immaterial whether the pre-empted land be deemed ancestral or not—a point upon which no definite finding was given; and that the suit should have been dismissed with costs,

In this appeal we will deal first with the pre-empted land. In our opinion it is not "ancestral." No doubt Muhammadi raised the purchase money by mortgaging ancestral land; but the reversioners' remedy is not to follow the purchased land as if it were ancestral, but to sue for a declaration that the mortgage aforesaid was not for "necessity," and should not be considered binding on them. This was not done, and perhaps cannot now be done, but this is immaterial.

As regards the rest of the land, it seems to us that the question of its being ancestral or not was very important. In the first Court defendants denied its ancestral nature; but the point was found against them, and unfortunately in the lower Appellate Court defendant 2, who appealed, virtually conceded that it was ancestral; that is, in the second ground of appeal she pleaded that the pre-empted land was a self-acquisition, and nowhere in the appeal did she contest the finding that the rest was ancestral. Consequently, though we can find no proof whatever that this land really is ancestral, we must take it to be so, with the result that, while the pre-empted land goes to the daughter, defendant 2, in absolute ownership under the will, the rest of the land does not. There is no proof that among these Gujars, a sonless proprietor has power by will to alter the ordinary rule of succession in the sense that he can will ancestral land in absolute ownership to a daughter in the presence of near collaterals.

As regards *khana-damadi*, the institution is, of course, well established among Gujars; but we can find no authority for the Divisional Judge's ruling, that Muhammadi could appoint a *khana-damad* in the way set forth in the will. The daughter is five years of age and unmarried, and it is said she will probably never marry, being deformed. A



*khana-damad*, as described in countless Chief Court rulings, is a man who marries the daughter of a sonless proprietor and, instead of taking the girl away to his own house, lives on with her in her father's house, performing services for him, helping to manage his property, and generally taking up the position of a son. To extend this institution so as to cover the case of a future possible husband of the daughter would be a step for which we can find no vestige of authority, and we have no doubt that such an extension would be at variance with Gujar sentiment. It follows that the will which, we may note, was never "acquiesced in" by plaintiff, is in effect an invalid document and we must fall back upon the ordinary law of succession.

Here we are in agreement with the learned Divisional Judge. We think that among Gujars an unmarried daughter does hold her father's estate until death or marriage; but we cannot go further than this. The report of the Local Commissioner in the present case is vague and unconvincing; and there is no proof whatever of actual practice of succession of daughters in full ownership in presence of collaterals.

For these reasons we must accept the appeal and give plaintiff a decree in the following terms, namely, a declaration that, while the pre-empted land has become the absolute property of defendant 2, the remaining land will revert to plaintiff after both the following events have taken place, *viz.*, the death or remarriage of defendant 1 and the death or marriage of defendant 2.

In the circumstances parties should bear their own costs throughout.

*Appeal accepted.*

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## No. 3.

*Before the Hon'ble Mr. Justice Johnstone and Hon'ble Mr.  
Justice Scott-Smith.*

JIWAN AND ANOTHER,—(PLAINTIFFS),—PETITIONERS,

*Versus*

DIWAN SINGH AND ANOTHER,—(DEFENDANTS)—  
RESPONDENTS.

Civil Revision No. 2241 of 1907.

*Occupancy rights—Effect of non-cultivation by a minor—Punjab Tenancy  
Act, 1887, section 38.*

*Held following Lakha v. Thakar Dyal* <sup>(1)</sup> that under section 38 of the Punjab Tenancy Act, 1887, the occupancy rights of minors are not lost if they fail to manage the cultivation, their minority being a sufficient cause for their failure to cultivate.

*Petition under section 70 (a) and (b) of Act XVIII of 1884  
for revision of the decrees of Lala Achru Ram, Additional  
Divisional Judge, Hoshiarpur Division, dated the 3rd May  
1907.*

The judgment of the Court was delivered by

14th July 1909.

SCOTT-SMITH, J.—This revision was referred to a Bench for decision of the following question, namely, “what is the effect of non-cultivation by a minor of lands held by him as occupancy-tenant?”

Prior to the passing of Act XVI of 1887, it was held by this Court in *Ruttun Singh v. Easher Singh* <sup>(2)</sup> and *Idu v. Nihal Singh* <sup>(3)</sup> that such non-cultivation by a minor of the land comprised in his tenancy operated to extinguish his rights. Those rulings are inapplicable to cases provided for by Act XVI of 1887, and in *Lakha v. Thakar Dyal* <sup>(4)</sup> the Financial Commissioner held that under section 38 of the Act the minor's rights were not lost in such a case, his minority being a sufficient cause for his failure to cultivate. He said: “The decisions of the Courts below appear to me to be erroneous under the law as it now stands; and inequitable, inasmuch as they open a door to landlords to take advantage of the minority of a tenant, to destroy his occupancy right; that is, to do him a wrong when his circumstances specially call for their lenient consideration.”

<sup>(1)</sup> 2 P. R. 1901, Rev.

<sup>(2)</sup> 5 P. R. 1872.

<sup>(3)</sup> 12 P. R. 1879.

<sup>(4)</sup> 2 P. R. 1901.

We fully agree with this decision of the Financial Commissioner. We are very clearly of opinion that the legislature did not intend that non-cultivation of his land by a minor occupancy tenant should operate to extinguish his rights under section 38 of the Act.

Coming to the facts of this particular case we find from the patwari's statement that the revenue records which are the best and only reliable evidence on the point, show that the occupancy tenants left, or were dispossessed of the land after the death of Wazira, Wazira died on 23rd June 1899 and the landlords began to cultivate in *Sambat* 1958-59 (1901-2 A. D.).

We allow the revision and setting aside the decrees of the lower Courts, give plaintiff a decree for possession of the land in suit against the defendants with costs throughout.

*Revision allowed.*

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**No. 4.**

*Before the Hon'ble Mr. Justice Johnstone and Hon'ble Mr. Justice Scott-Smith.*

**MIAN KASIM,—(PLAINTIFF),—APPELLANT,**

*Versus*

**SAMAIL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.**

**Civil Appeal No. 683 of 1907.**

*Custom—Succession—haq-i-dastar—eldest son entitled to larger share—Janjiana Siyals, mauza Kharanwala, district Jhang.*

*Held*, that by a special custom prevailing among Janjiana Siyals of mauza Kharanwala in the Jhang district, the eldest son is entitled upon final partition to receive certain extra land in addition to his share by way of "Haq-i-dastar" or "Haq i-pagri."

*Further appeal from the decree of Khan Bahadar Khan Abdul Ghafur Khan, Additional Divisional Judge, Shahpur Division, at Jhelum, dated the 5th March 1907.*

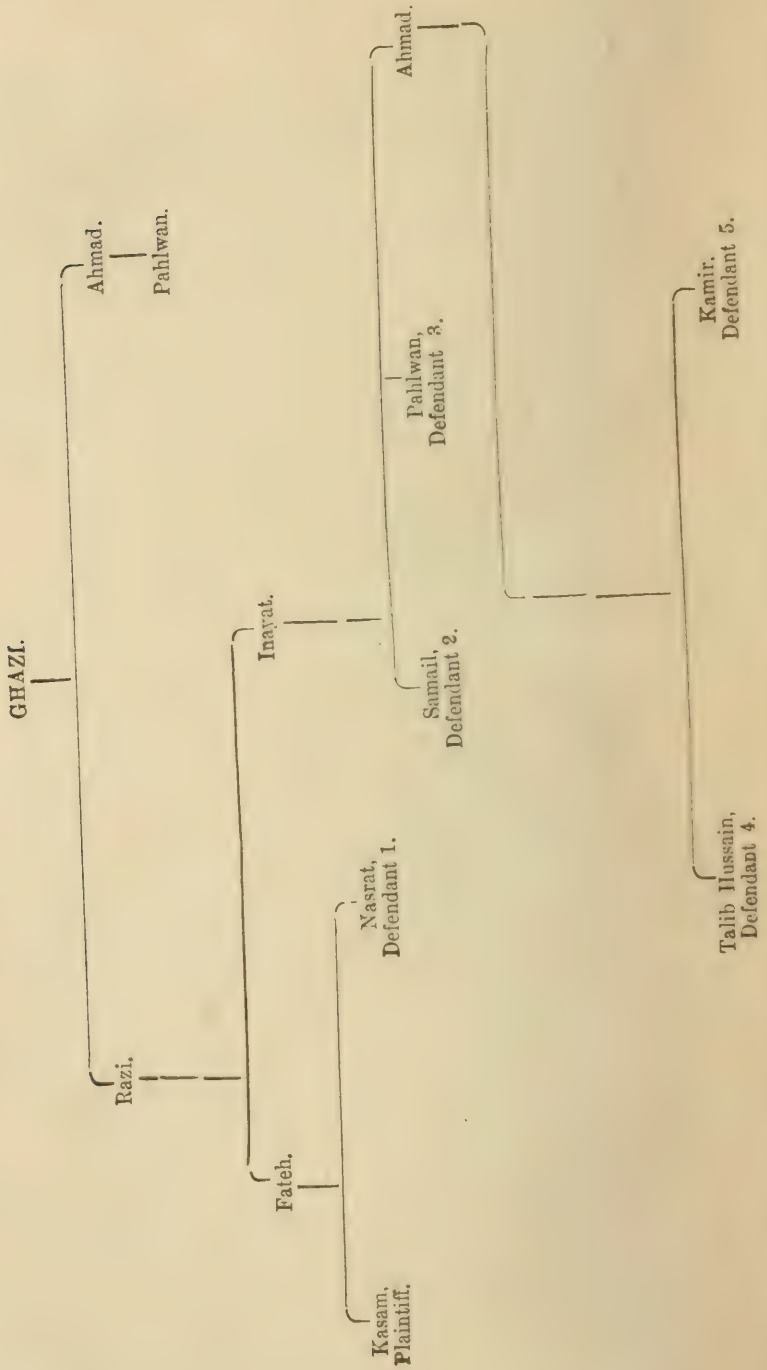
**Muhammad Shafi, for appellant.**

**Lal Chand, Shadi Lal and Lal Chand, for respondents.**

**The judgment of the Court was delivered by—**

**SCOTT-SMITH, J.**—The parties to this suit are Janjiana Siyals of Kharanwala in the Jhang district and their pedigree table is as follows:— 17th July 1909.





The facts are very fully stated in the judgment of the first Court which held that by a custom prevailing in the parties' family the eldest son was entitled upon final partition to receive more land than his share by way of *dastar* or *pagri* and that Kasam, plaintiff, would on this account be entitled to 300 bighas. It gave him a declaration that he would be entitled to receive this extra area out of the proprietary land of the descendants of Inayat, instead of out of the joint land of both parties as claimed.

The Divisional Judge's finding on appeal is summed up in the following extract from his judgment, "probably in the partition with Pahlwan, Fateh and Inayat had obtained some area as *haq-i-dastar*, but it does not follow that after more than 50 years the plaintiff, the elder son of Fateh, can now claim it from the defendants-appellants. The custom was not recognized in subsequent (cases) and was never asserted before now. Under these circumstances, I am of opinion that though the family in their dispute with Pahlwan had acquired more land than their shares, and designated it as *haq-i-pagri* that area fell to all its members and not to the eldest son of Fateh." He, therefore, dismissed the suit with costs.

Plaintiff has lodged a further appeal to this Court, and we have heard lengthy arguments as to whether the special family custom alleged by plaintiff has been established or not.

The question whether there was a will of Inayat's in which he admitted this *haq-i-dastar* and which gave rise to the third issue in the first Court has not been argued at all before us. We think the Divisional Judge was not quite correct in saying that the claim was based upon this will. The claim was based upon the existence of the alleged custom and the will was merely mentioned as an instance where defendant's ancestor had admitted the custom.

Plaintiff produced oral evidence and entries in the revenue papers of the villages inhabited by Janjiana Siyals with the object of showing that the eldest son in such families has usually on partition received a larger share of land than his brothers.

The cumulative effect of this evidence is certainly considerable, but Mr. Lal Chand has argued with great force that it is not of much value in view of the fact that in the *Riwaj-i-am* prepared in 1880 all the sons are said to inherit equally, and no exception was made in the case of Janjiana Siyals. Similarly in the *Riwaj-i-am* prepared in the recent Settlement it is stated

that all the sons, irrespective of age, get equal shares. Commenting on this Lala Ganga Ram, the Munsif who decided the case in the first Court, and who actually wrote the *Riwaj-i-am* of the recent settlement under the supervision of Mr. Abbott, said, "generally the custom of *dastar* does not appear to be obtaining in Siyal tribe, but it appears that the custom of "*dastar* is specially prevalent in the tribe of Siyals Janjiana to "which the parties belong."

Now the evidence of the prevalence of a special custom in the parties' family, which is contained in the proceedings of 1853 and 1856, and which is referred to in great detail in the judgment of the first Court (pages 6 and 7 of the paper book), appears to us to be very strong. Mr. Lal Chand in connection with this evidence suggested that the award of the arbitrators, and the statements of Pahlwan, Inayat and Fateh in the original file were probably forgeries, what he meant was that the original award and statements had been removed from the file and others substituted therefor.

His reasons were that—

(1) the copies though obtained by the plaintiff in September were not filed in Court till the following February, and (2) that the signature in *Hindi* characters of Bishan Das upon the award does not correspond with that upon the reference to arbitration. The first ground has, we consider, no force, for copies are often kept back by parties and filed after the oral evidence has been heard.

As regards the second ground, we notice that there is some difference in the two signatures, but these *Hindi* signatures often vary. Moreover, there is a previous award of 1853 on the same file also signed by Bishan Das, and the signature on it very closely corresponds with that on the one said by Mr. Lal Chand to be a forgery. We think, therefore, that there are no grounds whatever for supposing that the file has been tampered with.

The award and the statements of Pahlwan, Inayat and Fateh have been very clearly summarised in the judgment of the first Court. Inayat and Fateh distinctly claimed that the excess even in their possession was due to the fact that Ghazi had given their father Razi a larger share than Ahmad, owing to his being the elder son, and Pahlwan also agreed that the *haq-i-dastar* land measured some 400 bighas and might be excluded and the remainder be divided in equal shares. He



admitted therefore the existence of the custom by which the elder son got an extra amount of land as *dastar* though he contested the actual area. The arbitrators, however, held that the extra area in possession of Inayat and Fateh represented the *haq-i-dastar*. They also decided in their award that this extra area should go to Fateh at the time of the final partition. In reference to this Inayat stated in Court "according to the custom of our family so long as the entire land is not partitioned, the *haq-i-pagri* belongs to the younger and elder brothers jointly, even if partition is not made for several generations. But at the time of partition that right goes to the elder brother. At the time of partition Fateh also shall get that right from me." Then he went on to state how much the *pagri* land should be.

We think that this is the best possible evidence of the existence of the special family custom contended for by the plaintiff.

But Mr. Lal Chand has urged that even if the custom existed in 1856, it was not acted upon in certain partition proceedings in 1867 and 1888 between the parties, and therefore is no longer in force. We do not think that there is much force in this argument. These cases only related to portions of the parties' joint property and according to the file of 1856 the *pagri* area was to remain joint until the final partition. There was therefore no reason for claiming the *pagri* land in 1867 or 1888, and if any such claim had been made, it would certainly have failed as premature.

In the partition proceedings, which have given rise to this suit, Nasrat, brother and Murad, son, of the present plaintiff claimed, 100 bighas of land as their *haq-i-dastar*, but as pointed out by the first Court, they were not properly empowered agents of the plaintiff, and he cannot be bound by their statement. His duly appointed pleader stated 300 bighas of land to be the area claimed.

To sum up then, we are of opinion that the first Court's finding that the custom alleged prevails in the family of the parties is correct. As regards the area to be allotted to plaintiff on account of *haq-i-pagri*, no arguments have been addressed to us with the object of showing that the first Court was wrong in fixing it at 1,200 *kanals*.

We accept the appeal and setting aside the order of the Lower Appellate Court we restore the decree of the first Court

with this modification that the plaintiff will get the land in question out of the proprietary area of both parties and not out of that of the descendants of Inayat only. Defendants 2 to 4 to bear plaintiff's costs in all the Courts.

*Appeal accepted.*

**No. 5.**

*Before the Hon'ble Mr. F. A. Robertson, Officiating Chief Judge, and Hon'ble Mr. Justice Williams.*

ILAHİ BAKHSH AND OTHERS,—(DEFENDANTS),—  
APPELLANTS,

*Versus*

MUSSAMMAT BUDHI AND OTHERS,—(PLAINTIFFS),	}	—RESPONDENTS.
MUSSAMMAT MIHRAN AND OTHERS,—(DEFENDANTS),		

Civil Appeal No. 1395 of 1907.

*Custom—Succession—land inherited by daughters—Daughter's daughter and sister and sister's sons exclude collaterals—Muhammadian Rajputs, Hoshiarpur district.*

*Held*, that among Muhammadan Rajputs of Hoshiarpur (an endogamous tribe) where daughters have succeeded to their father's land as heirs, excluding his collaterals, their daughters are entitled to succeed to their mother's estate in the absence of direct male heirs, on the death of any of them and a sister or her sons would also exclude the collaterals in respect of such property.

*Further appeal from the decree of J. G. M. Rennie, Esquire, Divisional Judge, Hoshiarpur Division, dated the 17th October 1902*

Sukh Dial, for appellant.

Muhammad Shafi, Dharm Das and Umer Bakhsh, for respondents.

The judgment of the Court was delivered by—

22nd July 1909.

ROBERTSON, OFFG. C. J.—The facts in this case briefly are these. One Pir Bakhsh died leaving certain property. He had one son and 4 daughters. His son Banna succeeded and died. Nur Jan, wife of Pir Bakhsh, mother of Banna, then succeeded. Ranjha, her son-in-law, claimed occupancy rights in the land, and brought a suit. Nur Jan confessed judgment. This has been called a collusive suit, but in a judgment written in 1872 the Commissioner notes that a Revenue Officer had already declared Ranjha to be an hereditary tenant in the

course of an enquiry and that he was not prepared to say that it was a collusive suit. Nur Jan died and was succeeded by Mussammat Bego, one of the daughters of Pir Bakhsh, who, it is said in the mutation order, had been living with Mussammat Nur Jan. By gift, or family arrangement, half of the land was given to Mussammat Sarri, wife of Ranjha, who was occupancy tenant, and one half free of occupancy rights remained with Mussammat Bego. The parties are Muhammadan Rajputs of Hosbiarpur, endogamous, and the four daughters of Pir Bakhsh were married to four nephews, sister's sons of Pir Bakhsh, facts which it is important to remember in interpreting the conduct of the parties.

In 1871 the collaterals sued Mussammat Bego and Ranjha for possession of the land and to cancel the so-called gift of occupancy rights to Ranjha. In that suit it was clearly decided that the collaterals were too distantly related to succeed in preference to daughters and the daughters were declared to be the heirs—*Wuzeera v. Hukoo* (1) being followed. We think it quite clear that though the parties were agriculturists, they were understood to be not free from the influence of ideas pertaining to their personal law, and we see no reason to doubt that the decision was to the effect that the daughters, who were married to their own relatives, took a full estate, and not a mere life rent such as is sometimes under Customary Law allowed to unmarried daughters until death or marriage. We are quite unable to accede to the proposition put forward by Rai Sukh Dial that females never in any tribe, whether Hindu or Muhammadan, exogamous or endogamous, succeed to anything more than a life-rent, much more limited and restricted than that of a male succeeding under the same circumstances. This is a theory which, in our opinion, is not based upon a sufficiently solid substratum of fact. To that suit the present petitioner, Budhe Khan, or his predecessor in title was a party. In 1873 certain other collaterals again sued Mussammat Bego for possession and again it was decided that the relationship of the collaterals to Pir Bakhsh was so distant that the daughter succeeded in preference. Later on Mussammat Bego made a gift of 34 *kanals* odd to one Qudrat-Ulla and a suit was brought by certain collaterals including the petitioners to this Court, to contest that alienation, and in the judgment of this Court it was certainly laid down, and this is *res judicata* between the

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(1) 31 P. R., 1867.



parties, that the tenure of Mussammat Bego was limited and resembled that of a widow. That was in 1890 and was the interpretation given by a bench of this Court to the judgment of 1873. The earlier judgment was not considered. Upon that view we offer no comment. But the bench was very careful to point out that they gave no decision and offered no opinion as to who was entitled to succeed Mussammat Bego on her death.

As regards the half share of Mussammat Sarri no suit has been brought, and this was explained by Rai Sukh Dial by saying, that no doubt if Mussammat Bego had left sons they would have succeeded, but as she left only daughters, they cannot succeed and the collaterals are entitled to come in.

Now this is a proposition, which we are unable to accept. We have considered the rulings quoted to us for the appellant, *Lehna v. Mussammat Thakri* <sup>(1)</sup> *inter alia*, Roe's Tribal Law, page 61, section 13, etc. We do not think that there is sufficient authority for saying that when a daughter has been allowed to succeed as heir to her father's estate, that her daughter again cannot succeed to her. We admit that in dealing with Customary Law, logic is often apt to lead us astray, but we can see no logic in the proposition—Why is the succession to be limited to one female step?

It has just been laid down in a judgment of a Divisional bench of this Court that there is no authority for the proposition that when a gift has been made even to a male, it reverts to the donor's family so long as there are lineal descendants of the donee in the male or female line, because a woman clearly can be, and is, in certain circumstances, an heir. And in this case we think, whether in virtue of her feminine disability Mussammat Bego took a limited estate or not, she certainly excluded the collaterals and succeeded as an heir, and so is capable of transmitting her own estate to her daughter. We can see no reason for holding that her heirship depended on her producing sons. This would be sufficient to dispose of the case, but we must further point out that it is quite clear that the decisions of 1872 and 1873 were to the effect that daughters as such ousted the collaterals. The decisions were not based on any peculiarity of Mussammat Bego's in any way differentiating her rights from her sisters. It is clear, therefore, that the other sisters of Mussammat Bego had equal rights with Mussammat Bego, and we think the inference is irresistible that Mussammat Bego was

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(1) 32 P. R. 1895, F. B.

allowed to take the land by family arrangement, in fact her possession was permissive, and on her death her sisters are clearly entitled to come in. But even if this were not so, Mussammat Bego's "adverse" possession, as urged by Rai Sukh Dial, could not, on the contention of the appellants, extend beyond her life rent. If it was "adverse" in the full sense, then it was adverse against the whole world, including the petitioners, and their case is concluded at once. If it was not, and the appellants are clear that it was not, what sort of adverse title did it create in Mussammat Bego, and who is the beneficiary heir of that adverse title? Clearly it could only extend, if at all, to an adverse title to enjoy the estate *for her life*, and that title died absolutely with her, and we have to see who, after her death, is entitled to the possession and enjoyment of Pir Bakhsh's estate, and it is quite clear that the persons so entitled are the sisters of Mussammat Bego, and their sons after them.

But further, it having been admitted that the sons of the daughters of Pir Bakhsh could succeed to his estate, it is quite clear that when one daughter, who has enjoyed a life estate, dies, it is her sister's sons, the daughter's sons of Pir Bakhsh, who are entitled to succeed, and not the collaterals, and there are such sons living who admit the plaintiff's claim. On all these grounds we think the plaintiffs were entitled to succeed as against the collaterals, as, firstly, we hold that the plaintiffs themselves were entitled to succeed to their mother's estate, and secondly, there are other persons clearly entitled to oust the petitioners, who have surrendered their rights to the present plaintiffs.

The revision (appeal 70 (1) (b) ) fails, and is dismissed with costs throughout.

*Appeal dismissed.*

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### No. 6.

*Before the Hon'ble Mr. F. A. Robertson, Officiating Chief Judge, and Hon'ble Mr. Justice Shah Din.*

KANDA RAM,—(PLAINTIFF),—PETITIONER,  
Versus

KHAN MUHAMMAD KHAN AND OTHERS,—  
(DEFENDANTS),—RESPONDENTS.

Civil Revision No. 296 of 1908.

*Punjab Court of Wards Act, II of 1903, sections 26 and 31 (2) imperative—Non-production of a certificate bars further proceedings in a suit.*

*Held*, that the terms of section 31 (2) of the Punjab Court of Wards Act, 1903, are imperative, and prevent a Civil Court from proceeding with

any suit pending before it against a person, the superintendence of whose property has been assumed by the Court of Wards, until the plaintiff has filed a certificate that the claim has been notified in accordance with section 26 of the Act. It is not within the province of a Civil Court to determine whether the Deputy Commissioner should or should not have granted a certificate.

*Petition under section 70 (a) of Act XVIII of 1884 for revision of the orders of Lala Kesho Das, District Judge, Shahpur, dated the 31st October 1907 and the 2nd January 1908.*

Shadi Lal and Sukh Dial, for petitioner.

Muhammad Shafi, for respondent.

The judgment of the Court was delivered by—

23rd July 1909.

SHAH DIN, J.—The material facts of this case are briefly as follows:—On the 14th July 1900, the petitioner advanced a sum of Rs. 14,000 to the respondent, Khan Muhammad Nawaz Khan, to enable him to pay that amount to Government by way of *nazrana* in respect of a certain *chak* of land. The respondent executed a mortgage-deed in favour of the petitioner for the aforesaid sum mortgaging to him one-half of the *chak* in question, and the deed was registered on the 16th July 1900. Some time in the year 1905 or 1906 (the precise date is immaterial for our present purpose) proposals were made for placing the property of the respondent under the superintendence of the Court of Wards, and pending enquiry by the Deputy Commissioner under section 11 of Act II of 1903 (The Punjab Court of Wards Act) in order to satisfy himself as to whether action should be taken under the Act, that officer took temporary possession of the property of the respondent and appointed a manager under section 12 of the same Act.

The creditors of the respondent were, it seems, called upon by the Deputy Commissioner to inform him as to the nature and the amounts of their claims as part of the enquiry that was being then made under section 11, and the petitioner accordingly filed a statement of claim setting out what was due to him by the respondent under the mortgage-deed aforesaid. It further appears, as stated by the advocate for the petitioner, that in order to settle the petitioner's claim the Deputy Commissioner offered to pay him 12 annas in the rupee, but this offer was declined by the petitioner.

Soon after this, and while the enquiry which was being conducted under section 11 was still pending, the petitioner instituted a suit for enforcement of the mortgage in ques-



tion on the 6th June 1906, claiming a sum of Rs. 18,053-12-9 from the respondent. On summonses being issued to the respondent, he refused to accept service, and informed the process-server that his property had been taken possession of by the Deputy Commissioner, and that, therefore, notice of action should issue to the latter. This was accordingly done, but the Deputy Commissioner applied for a month's adjournment in order to enable him to make the necessary enquiries and to file a proper defence. An adjournment was granted as applied for, and the case was fixed for hearing on the 3rd October 1906. No notice of this date appears, however, to have been given either to the Deputy Commissioner or to the respondent, with the result that when the case came on for hearing on the 3rd October, no one appeared for the Deputy Commissioner or the respondent, and the District Judge ordered *ex parte* proceedings to be taken against the defendant to the suit. On the next date of hearing some evidence was taken for the plaintiff, and on the 27th October 1906 an *ex parte* decree was passed against the present respondent.

An appeal was preferred to this Court from the *ex parte* decree aforesaid on the 24th January 1907. On the 31st January 1907 the Court of Wards assumed the superintendence of the property of the respondent, and the order of assumption was duly notified in the *Punjab Gazette* of the 7th February 1907 under section 9 of Act II of 1903. On the 22nd April 1907 an application was made in this Court by the counsel for the respondent (who was then an appellant), praying that the Court of Wards be added as a party-appellant. This application was granted on the 3rd May 1907, and a notice was duly sent to the Deputy Commissioner, Mianwali, as representing the Court of Wards, informing him of the action taken on the ward's application and of the date fixed for the hearing of the appeal. This notice was served on the Deputy Commissioner on the 30th May 1907. The appeal was heard in due course, and the *ex parte* decree of the District Judge being set aside, the case was sent back for fresh trial and decision. The judgment of this Court is dated the 6th August 1907 and contains a very full summary of all the proceedings between the institution of the suit and the passing of the *ex parte* decree against the respondent.

On the case going back, the District Judge passed a formal order on the 3rd October 1907, impleading the Court

of Wards as a defendant under section 20 of the Act (II of 1903). On the 29th October objection was raised on behalf of the Court of Wards to the effect that under the provisions of section 31 (2) of the Act the suit could not proceed further without the plaintiff (present petitioner) filing a certificate that the claim had been notified by him in accordance with section 26. To this objection the plaintiff filed a written answer on the 30th October, and on the 31st October the District Judge passed the order under revision staying proceedings under section 31 (2) of the Act up to the 2nd January 1908 to enable the plaintiff to file the required certificate. This order was passed, as appears from the terms thereof, by agreement of the parties in accordance with the express prayer of the plaintiff as made in his written answer (paragraph (c) of the order of the District Judge). Upon this adjournment being granted, the plaintiff, it seems, applied to the Deputy Commissioner for a certificate in the terms of section 31 (2) of the Act, but the application was rejected. On the 2nd January 1908, the plaintiff produced before the District Judge the order of the Deputy Commissioner rejecting his application, and "asked for time for applying to the Court of Wards (Financial Commissioner) for revising the Deputy Commissioner's order." The defendant, the Deputy Commissioner, on the other hand, urged that the certificate having been refused the suit was not maintainable and should be dismissed. The District Judge did not, however, accept this objection, and substantially acceding to the plaintiff's prayer passed an order "staying the proceedings *sine die* until the result of the application to the Financial Commissioner is known."

The present petition for revision is filed both in respect of the order of the 31st October 1907 and of the order of the 2nd January 1908; and in support thereof it is urged that section 31 (2) of Act II of 1903 does not apply to this case, that under the circumstances set out above it was not necessary for the petitioner to notify his claim to the Deputy Commissioner under section 26 and section 27 of the Act, the Deputy Commissioner being already fully aware of the nature and the particulars of that claim, and that in any case it should be held that the Court of Wards waived its right to receive a notice of claim under section 26.

For the respondents it is contended that there is no ground for revision in this case, inasmuch as the proceedings have been stayed at the request of the petitioner himself and in his

interests, and also because the orders sought to be revised are mere interlocutory orders which do not dispose of any definite branch of the case, *Pandit Ruma Kant v. Pandit Rag Deo* (1) that the provisions of section 26, section 27, and section 31 (2) of the Act are imperative and must be strictly complied with by the claimant and by the Court, as the case may be; and that unless a certificate mentioned in section 31 (2) is produced by the petitioner, the suit cannot be proceeded with, and the consequences specified in section 29 of the Act will follow.

We have given our best consideration to the argument of the petitioner's advocate, and though, as he endeavoured to show, the consequences of a refusal on the part of the Deputy Commissioner to grant to his client the requisite certificate referred to in section 31 (2) may be serious, we are constrained to hold that, in view of the imperative terms of the sub-section aforesaid, the only course open to the District Judge was the one that he has adopted, namely, to stay proceedings until the necessary certificate is produced. Whether the Deputy Commissioner should or should not have granted the certificate applied for, it is not within our province to determine; but it is clear that until such certificate is filed by the petitioner, the District Judge has no power under the Act to proceed with the suit, and if he had so proceeded, his proceedings would have been *ultra vires*. Under the provisions of section 26 and section 27 notice of a claim has to be given by the claimant concerned within a specified period and in a specified manner, and thereupon the Deputy Commissioner has to take definite action under section 28. If these provisions are not strictly complied with (as admittedly has not been done in this case), the mere fact that the Deputy Commissioner concerned has otherwise acquired a knowledge of the nature and the particulars of the claim in question will not suffice, and the Court before which a suit based on that claim is pending, is bound as a matter of law to require the production of a certificate under section 31 (2). We are quite clear that there has been no waiver (assuming that there can be any such waiver) on the part of the Court of Wards of its right to receive a notice of claim under section 26 and section 27; and it seems to us that the provisions of section 31 (2) fully apply to this case. That being the case, not only was the District Judge justified in passing the order of the 2nd January 1908, but he was bound to pass that order; and we fail to see how it

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(1) 60 P. R. 1897, F. B.



can be said that in passing the order in question he acted with material irregularity or refused to exercise a jurisdiction vested in him by law.

We understand that the order of the Deputy Commissioner refusing to grant to the petitioner a certificate of the description referred to in section 31 (2) of the Court of Wards Act is the subject of a revision application filed by the petitioner, and we have no doubt that the Financial Commissioner as the Court of Wards will pass thereon whatever orders he thinks fit to pass under section 34 of the Act.

The revision fails and is dismissed with costs.

*Revision rejected.*

### No. 7.

*Before the Hon'ble Mr. Justice Johnstone.*

MUHAMMAD KHAN,—(DEFENDANT),—APPELLANT,

*Versus*

SARDAR AND OTHERS,—(PLAINTIFFS),—RESPONDENTS.

Civil Appeal No. 22 of 1909.

*Punjab Laws Act, 1872 - Punjab Pre-emption Act, II of 1905—"Agricultural tribes"—lis pendens.*

*m k*      *?*  
K. D. sold the land in suit to M. B. Separate suits for pre-emption were brought by K. B. and A. B. on 22nd October, 1902, and summonses were served on 24th October for 7th November. On 29th October M. K. filed a suit for pre-emption, and on 7th November obtained from M. B., vendee, a deed of sale of the land for the full price mentioned in the previous sale-deed. M. K. then allowed his own suit to go by default and was made defendant in the other two suits.

*Held—*

(i) that, inasmuch as K. B. belonged to the *Kureshi* tribe, which was not notified as an agricultural tribe under Act XIII of 1901, until 1904, he had no right of pre-emption at all at time of suit, and, therefore, his suit must fail ;

(ii) that A. B. and M. K. must share the bargain, neither being in the circumstances in a better position than the other, inasmuch as (a) A. B.'s suing a week earlier than M. K. does not amount to "superior diligence ;" (b) A. B. and M. K. had, under pre-emption law, equal rights *ab initio* ; (c) M. K.'s not obtaining a decree but taking a transfer out of Court instead does not tell against him ; (e) M. K.'s purchase, being *pendente lite*, does not operate to put him in a better position than A. B.

*Parma Nand v. Ghulam Fatima* <sup>(1)</sup> followed, *Mahmud Khan v. Khuda Bakhsh* <sup>(2)</sup> explained, *Narain Singh v. Parbat Singh* <sup>(3)</sup> distinguished.

<sup>(1)</sup> 15 P. R., 1905.

<sup>(2)</sup> 26 P. R. 1908.

<sup>(3)</sup> I. L. R., 23 All. 247.

*Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 31st August 1908.*

Nanak Chand, for appellant.

Muhammad Shafi, for Khuda Bakhsh.

Vishnu Singh, for Sardar.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—This order will dispose of appeals Nos. 22 and 23. On 11th January 1907 appeals Nos. 44 and 45 of 1907 by Mahmud Khan were accepted, and the cases were remanded for re-trial under section 562, Civil Procedure Code (1882). The judgment of this Court has been printed as *Mahmud Khan v. Khuda Bakhsh* (1). It laid down that, if Mahmud Khan had the superior right of pre-emption, then his purchase *pendente lite* is not affected by the rule of *lis pendens*. On the re-trial the first Court, placing a certain interpretation upon that ruling, dismissed the plaintiff's suit with costs; but on appeal the lower Appellate Court took a different view, accepted the appeals of both Khuda Bakhsh and Amir Bakhsh, and restored the decree of Mr. Anderson of 18th March 1903, directing also that, except as regards costs already received by plaintiffs, the parties should bear their own costs. 26th July 1909.

Mahmud Khan has come up on revision side in both cases, and the petitions have been admitted as appeals under clause (b). In the way I look at the case of Khuda Bakhsh it can be decided solely on the question of his status *qua* pre-emptive rights as a *Kureshi*. I will take this question first giving a few necessary facts at the same time, and will then proceed to dispose of the case of Amir Bakhsh.

The mutation of the original sale to Maula Bakhsh by Karam Dad, vendor, is dated 7th June 1902. Khuda Bakhsh and Amir Bakhsh each sued separately for pre-emption on 22nd October 1902. Summonses were served on vendor and vendee on 24th October, the date fixed for hearing being 7th November 1902. On 29th October, five days after service, Mahmud Khan, present appellant, brought *his* suit for pre-emption, and on 7th November, the date for hearing of the other two suits, he got from Maula Bakhsh, vendee, who had no pre-emptive

(1) 26 P. R. 1908.

rights at all, a deed of sale of the property to himself for the full sum of Rs. 500 mentioned as price in the deed of 7th June 1902. Then Mahmud Khan applied to be made a defendant in the other suits and allowed his own suit to be dismissed for default. The Court heard the former suits, found the sale to Mahmud Khan collusive and done *pendente lite*, and gave decree for pre-emption on payment of Rs. 100 only, giving the preference to Khuda Bakhsh and the right to Amir Bakhsh only if Khuda Bakhsh made default.

The Lower Appellate Court held the doctrine of *lis pendens* applied, found that Mahmud Khan was in no better position than his vendor, Maula Bakhsh, and upheld the first Court's decision. This was on 20th July 1903.

It is admitted that the relative rights of Khuda Bakhsh and Mahmud Khan must be gauged with reference to Act IV of 1872 and not to Act II of 1905 (Punjab). But it is urged on behalf of Mahmud Khan that Khuda Bakhsh had, when he brought his suit, no right of pre-emption at all, because, being a *Kureshi*, he was not then a member of a notified agricultural tribe under Act XIII of 1900, the *Kureshis* having admittedly not been so notified till 1904. This being so, *Parma Nand v. Ghulam Fatima* <sup>(1)</sup> is quoted as authority that, since Act XIII of 1901 came into force, a person who is not a member of an agricultural tribe cannot sue for pre-emption of agricultural land at all.

To this Mr. Muhammad Shafi replies that the *Kureshis* have always in Gujrat been an agricultural tribe in fact, and that the Notification of 1904 merely recognised that fact. Now in my opinion this reply is inadequate. A plaintiff has to shew that, when he filed his suit, he had a right to sue. In pre-emption cases a plaintiff must shew that at date of sale and also at date of institution of suit he had a right of pre-emption superior to that of the vendee: for this there is abounding authority in the *Punjab Record*. How then can Khuda Bakhsh maintain this suit, which would have been thrown out in 1902, had the Court hearing it understood the real state of the law as laid down in *Parma Nand v. Ghulam Fatima* <sup>(1)</sup>? The mere fact that the case was allowed to go on does not seem to me to make any difference, nor can I see how the notification of the tribe in 1904

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<sup>(1)</sup> 15 P. R. 1905,



can validate a claim which was bad when made. Section 4, Act XIII of 1901, lends no colour to the argument that a tribe can be held "agricultural" "for the purposes of this Act" before actual Notification in the *Gazette* takes place or that such a Notification has retrospective effect.

It may be said, though it has not actually been said, that, inasmuch as Mahmud Khan as defendant in the original Court did not plead that Khuda Bakhsh was disabled from suing as not being a member of an agricultural tribe, and only pleads this now after the Kureshis have been notified, the plea should be ignored. On the whole I am inclined to reject this idea. It seems to me that this exclusion of persons not members of agricultural tribes from suing for pre-emption is an absolute exclusion not depending upon the pleadings of defendants, and I refer to section 20, Act II of 1905 (Punjab), in support of this view.

My opinion, then, is that Khuda Bakhsh's suit must fail; but in connection with Amir Bakhsh's case (Further Appeal 22 of 1909) it is necessary to go into other questions. It seems to me that the meaning and effect of *Mahmud Khan v. Khuda Bakhsh* <sup>(1)</sup> are clear enough, namely, that Mahmud Khan's purchase of 7th November 1902, if it was simply in pursuance of actual superior rights of pre-emption already possessed, could not be brushed aside on an application of the doctrine of *lis pendens*. That doctrine could not interfere with those previously existing rights which had been asserted by the purchase, merely because the purchase was made *pendente lite* of Amir Bakhsh. Let us see then whether Mahmud Khan had, apart from his purchase, rights superior to those of Amir Bakhsh.

Amir Bakhsh is merely a landlord in the village, and Mahmud Khan appears to be this and also a collateral of the vendor. The point is whether this relationship helps him. The village is admittedly *bhayachara*, and therefore a special custom must be made out. Mr. Nanak Chand points to the *Riwaj-i-am*, question 21, page 6, Appendix, and to the ruling in Civil Appeal 754 of 1903. No instances are cited in support of the *Riwaj-i-am*, and the ruling quoted is not of much use here. As has, been frequently, pointed out, pre-

(1) 22 P. R., 1908.

emption is a village custom, not a tribal one, and the existence of a special custom of pre-emption in one village of Gujars is not even *prima facie* proof of its existence in another Gujar village. It is clear, therefore, that Mahmud Khan has not made out any superior rights; and it must be held that he and Amir Bakhsh had equal rights.

The result is, in my opinion, that they must share the bargain. This is not an infringement of *Mahmud Khan v. Khuda Bakhsh* (1). Mahmud Khan sued for pre-emption as well as Amir Bakhsh, and suing only a week later, I do not think the latter can be given an advantage on the score of "superior diligence." No doubt Amir Bakhsh got a decree and Mahmud Khan did not; but this cannot tell against the latter, whose claim was admitted by the vendee and who was quite justified in preferring an immediate settlement by taking a deed of sale to a decree to be followed by execution. By getting his deed, Mahmud Khan cannot (*Mahmud Khan v. Khuda Bakhsh* (1)) claim that his rights, which were only equal to Amir Bakhsh's, become superior; but I think he can claim that by taking the deed he does not lose the equal rights that were already his. I do not think *Narain Singh v. Parbair Singh* (2), quoted by Mr. Shafi, is in point. There the vendee *pendente lite* had not filed a suit and so shewn diligence equal to his rival's: he had simply purchased *pendente lite*.

I accept the appeal of Mahmud Khan in Khuda Bakhsh's case and dismiss that suit. Order as to costs as above.

I accept the appeal against Amir Bakhsh and direct that Amir Bakhsh do have an amended decree for half the property on payment of Rs. 50 within one month. Order as to costs as above.

*Appeals accepted.*

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### No. 8.

*Before the Hon'ble Mr. Justice Johnstone.*

INAYAT AND OTHERS,—(PLAINTIFFS),—APPELLANTS,

*Versus*

NOURANG AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 42 of 1909.

*Civil Procedure Code (1882) section 43,—proceedings in Revenue Court no bar to a Civil Court,—Jurisdiction of Civil and Revenue Court—claim for land in addition to that allowed in partition proceedings—Punjab Land Revenue Act, XVII of 1887, section 158 (1).*

(1) 26 P. R., 1908.

(2) I. L. R., 28 All., 247.

In mutation proceedings in 1903 plaintiffs were recorded as owning 16 shares and defendants 32 shares out of 480 shares in a joint khata. This khata was subsequently split up and a new khata No. 10 formed out of part of it, in which plaintiff was shown as owning one-sixth according to what had gone before. In 1905 plaintiffs themselves applied to the revenue authorities for partition of khata No. 10 without specifying their own share and partition was duly made and was formally accepted by them, one-sixth share having been allotted to them. On a suit now brought by the plaintiffs in a Civil Court asking one-twelfth share more on the ground that the mutation of 1903 was wrong.

*Held*, that section 43, Civil Procedure Code, 1882, cannot be used to bar a suit in a Civil Court because of something that has happened in a Revenue Court and section 155 (2), Land Revenue Act, has no bearing on the case.

But *held also*, that section 158 (2) of the Punjab Land Revenue Act prevents a Civil Court from taking cognizance of the matter.

*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated 10th March 1908.*

Raushan Lal, for appellants.

Nand Lal and Bahadur Chand for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—Mutation took place in 1903 and by it 27th July 1909 plaintiffs were recorded as owning 16 shares and defendants as owning 32 shares out of 480 shares in the land then included in the joint khata. That khata seems then to have been split up and a new khata No. 10 was constituted out of part of it, in which, according to what had gone before, plaintiffs were shewn as owning one-sixth. Then in 1905 plaintiffs themselves applied to the revenue authorities for partition of that khata No. 10, not specifying their own share, and partition was duly made and was formally accepted by plaintiffs, to whom one-sixth only was allotted. Then in October 1906 plaintiffs brought the present suit in the Civil Court asking for one-twelfth more on the ground that really the mutation of 1903, which I should note, was made at the instance of defendants but in the presence of plaintiffs, was wrong.

In the partition proceedings of 1905 plaintiffs had said not a word about their right to more than one-sixth. They now say they should have had one-fourth.

The Courts below seem to have had some difficulty in grasping the case. They both saw the absurdity of letting plaintiffs come in now with a Civil suit to upset a partition to which they raised no objection at the time; but the first Court held the



case not cognizable by it by reason of section 158, sub-section (2), clause (17), Land Revenue Act, and the Lower Appellate Court threw out the appeal on the strength of section 43, Civil Procedure Code (1882).

The Lower Appellate Court's view is clearly unsound. Section 43, Civil Procedure Code (1882), cannot be used to bar a suit in a Civil Court because of something that has happened in a Revenue Court. If in the partition case plaintiffs had raised the question of their shares, which would have been a question of title, and if that Court sitting as a Civil Court\* had then decided that question, and plaintiffs were now suing for something more than they then asked for, section 43 would have barred them. But, as matters stand, the Court of 1905 was a Revenue Court from start to finish, and thus that section has no bearing on the case.

The first Court's way of putting the matter is also not correct. The real bar to plaintiffs' suit is to be found in section 158 (1), Land Revenue Act. The Revenue Court of 1905 was "empowered" to effect the partition,\* and if it chose, to decide any question of title that might arise,† but no question of title was "in dispute"‡ before it, because plaintiffs never raised it. The Revenue Court being so "empowered," section 158 (1) prevents any Civil Court from taking cognizance of the matter. The existence of the qualification as regards questions of "title" in section 158 (2), (17), does not affect this bar. That qualification was there inserted because in certain circumstances—see sections 116, 117, Land Revenue Act—as we have seen, the Revenue Court dealing with a partition case can refer the parties to a Civil suit upon a question of title "in dispute" before it, or can itself sit as a Civil Court and decide, such a question.

I therefore uphold the decree of the Lower Appellate Court, though for reasons different from those given by the first Court and Lower Appellate Court, and I dismiss this appeal with costs.

*Appeal dismissed.*

\*Sections 116, 117, Land Revenue Act.

\*Chapter IX, Land Revenue Act.

†Section 117, Land Revenue Act.

‡Section 116, Land Revenue Act.

## No. 9.

*Before the Hon'ble Mr. Justice Scott-Smith.*

QADU,—DEFENDANT,

*Versus*

BULAND KHAN AND OTHERS,—PLAINTIFFS,

ALLAH DIA AND OTHERS,—DEFENDANTS.

Civil Reference No. 23 of 1909.

*Jurisdiction—Civil Court or Revenue Court—Suit by landlord for possession of land left by deceased occupancy tenant against a mortgagee of the occupancy rights.*

*Held*, that a suit by a landlord against the mortgagee for possession of the land left by an occupancy tenant on the ground, that the tenant having died without heirs, the occupancy rights have been extinguished under section 59 (4) of the Punjab Tenancy Act, 1887, and the mortgagee's rights have *ipso facto* come to an end, is cognizable by a Civil Court.

*Case referred by Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 3rd April 1909, under section 100 of the Punjab Tenancy Act (XVI of 1887).*

*Gurdial v. Farida* (1) distinguished.†

The order of the learned Judge was as follows :—

SCOTT-SMITH, J.—This is a reference under section 100 of 30th July 1909 the Punjab Tenancy Act, XVI of 1887.

The facts are that Sandhi, deceased, occupancy tenant of the land, mortgaged his right to Qadu, defendant, on 1st June 1895.

Plaintiff, who are the landlords, brought this suit for possession on the ground that Sandhi having died without heirs, the occupancy rights were extinguished under section 59 (4) of the Tenancy Act, and the mortgagee's rights came to an end. He said that one Wazira had sued for the land as heir of Sandhi, but his suit was dismissed by the lower Courts and is now pending in this Court.

The first Court, that of a Munsif, 1st class, decreed the plaintiffs' claim on the ground that the occupancy tenant's liability as a mortgagor had not devolved upon them, remarking that Wazira, if eventually successful, could recover the land from them.

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(1) 88 P. R. 1894.

The Divisional Judge, remarking that *Gurdial v. Farida* <sup>(1)</sup> is a clear authority for holding that the present suit is one cognizable by the Revenue Courts, has made this reference. He describes the suit as one by landlords to set aside a transfer made of a right of occupancy.

*Primâ facie* this does not appear to be a correct description of the present suit. It is one for possession of land which was mortgaged by the occupancy tenant on the ground that the occupancy rights, and consequently the mortgage rights, have been extinguished by the death without heirs of the occupancy tenant.

Turning now to *Gurdial v. Farida* <sup>(1)</sup> I find that the Judge who decided that case held it to be a revenue one, because the landlords sued on the ground that the alienation by the tenant was contrary to law. He said: "The suit as framed is a revenue suit, unless it can be affirmed that plaintiff, claims that he has a right to succeed without setting aside the transfer." In the present suit plaintiffs do not at all impugn the validity of the mortgage; what they say is that the mortgage is no longer subsisting because the occupancy rights have been extinguished owing to the death without heirs of the occupancy tenant. The case is therefore clearly distinguishable from the one quoted by the learned Divisional Judge.

The present suit has, I hold, been rightly heard and decided by a Civil Court, and I return the files to the Divisional Judge that he may dispose of the appeal according to law.

### No. 10.

*Before the Hon'ble Mr. Justice Johnstone and Hon'ble  
Mr. Justice Shah Dîn.*

OAKES & Co, LIMITED, OF MADRAS,—  
DECREE-HOLDER,

*Versus*

MR. J. P. DISCARCIE,—JUDGMENT-DEBTOR.

Civil Reference No. 7 of 1909.

*Execution of decree—Attachment of salary of Assistant Surgeon in military employ—Army Act, 1881—Sections 136, 144, proviso 1, and section 190—Civil Procedure Code, 1908—Sections 2 (17) and 60 (1) (i)—Procedure where Commanding Officer refuses to carry out attachment—Order XXI, rule 48 (3).*

<sup>(1)</sup> 88 P. R. 1894.



*Held*, that the pay of an Assistant Surgeon in military employ, not being a public officer within the meaning of section 60 (1) (i), Civil Procedure Code, 1908, is protected from attachment in execution of a decree.

*Held*, also, that where a Commanding Officer refuses to comply with an order of attachment, although the pay is attachable, the Court under Order XXI, rule 48 (3), Civil Procedure Code, should proceed to recover from Government for the benefit of the decree-holder the sums which should have been stopped out of the judgment-debtor's pay, leaving Government to settle up as it pleases with its officer, the judgment-debtor.

*Case referred by A. H. Parker, Esquire, Officiating District Judge, Lahore, with his memo., dated 20th January 1909.*

Mukerjee, for decree-holder.

Broadway, for Crown.

The order of the Court was delivered by—

JOHNSTONE, J.—This is a reference to the Chief Court under Order XLVI, rule 1, Civil Procedure Code. Briefly stated the facts are that Messrs. Oakes & Co. of Madras, had a decree against J. P. Discarcie, an Assistant Surgeon, serving under the Military Department. The decree was one for Rs. 499-3-0 and had been passed by the Small Cause Court, Madras, and it had been transferred for execution to the Court of the 1st class Munsif, Lahore, the judgment-debtor being on duty in Lahore Cantonment. The prayer was for attachment of half the pay of the judgment-debtor. The Officer Commanding the Cantonment refused to execute the warrant, in the first instance on the ground that the judgment-debtor was subject to the Indian Articles of War and so was protected by Part III, Article 182. The Munsif pointed out that this was not so and that the Army Act was applicable, but the Officer Commanding again expressed a contrary opinion, described judgment-debtor as a "gazetted Warrant Officer" and refused compliance. A correspondence followed between the Munsif, the District Judge and the Divisional Judge, ending with the last named officer directing the Munsif to issue another warrant and to inform the Officer Commanding that it was desirable that the judgment-debtor should appear in person and state his own objections. The Munsif acted accordingly, but the only result was a letter from the Officer Commanding to the effect that the Judgment-debtor was not, as previously stated, subject to the Articles of War, but that even under the Army Act, the pay of the judgment-debtor, he being a "Warrant Officer," could not be attached. This opinion was based upon a letter from the Acting Deputy Judge Advocate

28th May 1909.

General of the Northern Army, in which that authority described the judgment-debtor as a "Warrant Officer."

The Munsif asks us :—

(1) Is the pay of an Assistant Surgeon of a Station Hospital absolutely protected from attachment in execution of a decree, section 144 (3), proviso 1, Army Act, 1881 ?

(2) What steps should the Civil Court take, when the Officer Commanding refuses to comply with an order of attachment ?

The answer to the latter question, provided the pay is attachable, is contained in Order XXI, rule 48 (3), Civil Procedure Code ; that is to say, the Court should proceed to recover from Government for the benefit of the decree-holder the sums which should have been stopped out of the judgment-debtor's pay and remitted to the Court by the officer authorized to disburse the judgment-debtor's pay, leaving Government to settle up as it pleases with its officer, the judgment-debtor.

The other question is more difficult. The proviso to section 144, Army Act (44 and 45 Vict., Chap. 58) seems in terms to protect the whole of the pay of a "soldier" from attachment under a decree, and the original section 151 (3) of the same Act extended the same protection to "soldiers." Section 190, clause (6) defines "soldier" so as to include "Warrant Officer" unless the Warrant Officer has an honorary commission. Section 151 (3) has been repealed as a result of the abolition of Courts of Request, but an important addition was at the same time (1895) made to section 136, as indicated below, the words in italics being the new addition.

"The pay of an officer or soldier of <sup>Her</sup><sub>His</sub> Majesty's regular forces shall be paid without any deduction other than the "deductions authorized by this or any other Act,\* or by any "Royal Warrant for the time being, or by *any law passed by* "the Governor-General in Council."

This, of course, at once brings in the Civil Procedure Code, and we have to consider first, section 60, proviso (i), (iii) of that Code. The question for decision is whether the judgment-debtor in the present case is a "public officer" within the meaning of that proviso ? The phrase is defined in section 2 (17) of the Code at great length, but the only sub-clauses we need look at, are (c) and (h) and the question is ultimately this—

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\* Meaning, Act of the British Parliament.

Not being a "Commissioned Officer" in the Military Force of His Majesty, is the judgment-debtor a "gazetted officer," [clause (c)] or is he an "officer in the service or pay of the Government," [clause (h)], or is he neither?

We have no hesitation in holding that the judgment-debtor cannot come under sub-clause (h). Had the Legislature intended the words of that sub-clause to have so wide a meaning as to include an Assistant Surgeon in military employ *merely* because he was in the service and pay of Government, it is hard to see what need there was for the elaborate categories of public officers detailed in sub-clauses (a) to (g). Reading section 2 (17) as a whole with section 60 (i), it seems to us clear that section 2 (17) (h) cannot be taken as including a "soldier" as defined in section 190 (6) of the Army Act aforesaid.

So far as we are aware, the term "gazetted officer" has not been defined in any law or rule having the force of law. At page 2 of the Punjab Supplement to the Civil Service Regulations the expression is discussed at some length and the general definition is stated to be an officer whose appointment is gazetted by Government and not by the Head of a Department. It is also said that the distinction is broadly the same as that between superior and subordinate service. The rest of the discussion relates to purely civil appointments and to the distinction between "Provincial" and "Subordinate" service. Mr. Broadway argues that "gazetted officer" is equivalent to "Commissioned officer," but if this were so, why should section 2 (17) (c), Civil Procedure Code, open with the words "every commissioned or gazetted officer"? The implication here is that there may be gazetted officers who are not commissioned officers. Beyond this contention Mr. Broadway offers us no assistance.

As no definition of "gazetted officer" binding on the Courts is forthcoming we must decide the point in a reasonable way, using analogies where we find them. In the Army Regulations, India, Volume I, Pay and Allowances, paragraph 398, we find that Assistant Surgeons not holding Honorary Commissions are of four grades, the pay of the highest or 1st grade being Rs. 200 only, though extra allowances are admissible for special work. And in Volume II, paragraph 282, we find Assistant Surgeons described as Warrant Officers and Assistant Surgeons of 1st and 2nd grades ranking with Conductors, Master Gunners, School Masters and staff Sergeant-Majors. All this combined with the light thrown on the matter by the Supplement to the



Civil Service Regulations, adverted to above, makes it clear to us that Mr. Discarcie was not a "gazetted officer."

The first question put by the learned Munsif is therefore answered in the affirmative. No costs.

### No. 11.

*Before Hon. Mr. Justice Rattigan and Hon.  
Mr. Justice Williams.*

GANPAT RAI AND ANOTHER,—(PLAINTIFFS),—  
PETITIONERS,

*Versus*

MALLA MAL AND ANOTHER,—(DEFENDANTS),—  
RESPONDENTS.

Civil Revision No. 1044 of 1908.

*Provincial Insolvency Act, III of 1907, section 43, not applicable to proceedings begun under section 25 of the Punjab Laws Act, IV of 1872—General Clauses Act, X of 1897, section 6, clauses (c), (d) and (e).*

*Held*, that under the provisions of section 6 of the General Clauses Act, X of 1897, proceedings against an insolvent begun under section 25 of the Punjab Laws Act and pending when the Provincial Insolvency Act, III of 1907, came into force and repealed the insolvency sections of the former Act, must be continued and punishment imposed where necessary, as if the latter Act had not been passed, inasmuch as the new Act lays down a different punishment.

*Petition under section 70 (a) of Act XVIII of 1884 for revision of the order of A. Latifi, Esquire, District Judge, Amritsar, dated the 25th April 1908.*

Ishwar Das, for petitioner.

Sukh Dial, for respondent.

The judgment of the Court was delivered by—

16th July 1909.

WILLIAMS, J.—This is one of several cases which have come before us in which the point for determination has been, the extent to which the Provincial Insolvency Act, 1907 (III of 1907), applies retrospectively, so as to govern cases already instituted and actually pending at the time that that Act came into force. The other cases present questions of some difficulty which call for further consideration, but the one under consideration is so easily capable of determination, that we have thought it unnecessary to hold it over until the others are decided.

Section 6 of the General Clauses Act, 1897 (X of 1897), provides that when a repealing Act is passed, then, unless a different intention appears, the repeal shall not—

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- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed ; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed ; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed.

The Insolvency sections of the Punjab Laws Act, 1872 (IV of 1872), under which these proceedings were commenced were repealed by Act III of 1907, which substitutes other provisions for them. Under section 25 of the old Act certain acts of misconduct by the insolvent rendered him liable to be awarded a term of imprisonment in the civil jail not exceeding one year. Section 43 of the new Act, on the other hand, specifies certain acts of misconduct by the insolvent in language so different from that used in the former Act that it is impossible to say offhand whether the two enactments cover the same identical ground or not, and in the end makes these acts punishable with simple imprisonment (*i. e.*, with imprisonment in the Criminal Jail) for a term which may extend to one year.

Now, whatever view may be taken of the general practice of the Courts to treat section 6 of the General Clauses Act as not applying to "Acts of Procedure," and whatever interpretation be put upon the word "Procedure" when putting that practice into force, it is not, we think, capable of serious argument, that a repealing Act which substitutes imprisonment on the criminal side of a jail for imprisonment on the civil side is not calculated to affect the.....punishment incurred in respect of any offence committed against the repealed enactment ; and conse-

quently in the plain language of section 6 of the General Clauses Act the new Act is not to affect either the liabilities or punishments incurred under the old Act nor any legal proceedings in respect of them; but such legal proceedings are to be continued and such punishment imposed as if the new repealing Act had not been passed.

For the foregoing reasons, we consider that the Court of first instance should have completed its enquiry and passed its orders under Act IV of 1872 rather than under Act III of 1907; and we accordingly accept this application, and reversing the orders of imprisonment we return the case to the Judge of the Insolvents' Estates Court, Amritsar, for disposal according to law.

*Revision accepted.*

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**No. 12.**

*Before Hon. Mr. Justice Rattigan and  
Hon. Mr. Justice Williams.*

SETH RADHA KISHEN.—(PLAINTIFF),—PETITIONER,

*Versus.*

BINJ RAJ AND OTHERS,—(DEFENDANTS),—  
RESPONDENTS.

Civil Revision No. 1923 of 1908.

*Provincial Insolvency Act, III of 1907, section 27, not applicable to proceedings begun under section 28 of the Punjab Laws Act, IV of 1872—General Clauses Act, section 6, clauses (c), (d) and (e).*

*Held, following Danpat Rai v. Mulla Mal* <sup>(1)</sup> *that as the provisions (now repealed) of section 28 of the Punjab Laws Act, IV of 1872, differ materially from those of the repealing enactment (The Provincial Insolvency Act, III of 1907, section 27), and the latter makes important alterations in the vested and substantive rights of parties, orders in connection with a composition deed filed before the new Act came into force, should be made under the old law (vide section 6 of the General Clauses Act, X of 1897).*

*Petition under section 46 of Act III of 1907, for revision of the order of A. Latifi, Esquire, District Judge, Amritsar, dated the 19th June 1908.*

Sukh Dial, for petitioner.

Lal Chand and Bodh Raj, for respondent.



The judgment of the Court was delivered by—

WILLIAMS, J.—This case to some extent covers the same 16th July 1909.  
ground as Civil Revision Case No. 1044 of 1908 <sup>(1)</sup>, disposed of in our order of 16th July 1909. In this case, as in that, the decision turns on the effect which the Provincial Insolvency Act, 1907 (III of 1907) has on proceedings which were pending on the date on which it came into force, *viz.*, 1st January 1908. In the proceedings before us a composition-deed had been assented to, expressly or by implication, by “a majority of the creditors who represent about a lakh and a half as compared with “objector’s paltry five thousand rupees” and this was actually filed in Court prior to the new Act coming into force. Under the old Insolvency Law (section 23 of Act IV of 1872) the Court was bound to give effect to the composition, provided that no injustice or injury was thereby inflicted on any party concerned, and that no fraud or collusion was suspected. Under the new Act, the Court is under no such obligation, and even if it accepts the composition, it can attach conditions to the acceptance (*cf.*, *e. g.*, section 27, sub-section (5), ) which are not provided for in the more general provisions of the old Act. In these circumstances we are bound to hold, as in Civil Revision Case No. 1044 <sup>(1)</sup>, that the repealing Act makes important alterations in the vested, and substantive *rights* of the parties and that consequently the Court of first instance was justified in passing its final orders under the old Act. Whether in these circumstances section 46 of the new Act confers a right of appeal is a matter which it is unnecessary for us to consider here inasmuch as the appeal was in fact rejected. The other points taken in the grounds for revision all relate to matters of fact, so that there is no necessity to remand this application to a single Judge for further adjudication. It stands rejected with costs.

*Revision rejected.*

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**No. 13.**

*Before Hon. Mr. Justice Johnstone.*

JHANGI,—(PLAINTIFF),—PETITIONER,—

*Versus*

RAMZAN AND OTHERS,—(DEFENDANTS),—  
RESPONDENTS.

Civil Revision No. 520 of 1909.

*Chief Court’s powers of revision under section 70 (1), Punjab Courts Act—  
Material irregularity ”—Right to possession of shamilat by a co-sharer therein*

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<sup>(1)</sup> Reported as 11 P. R. 1910.

In 1883, in consequence of a dispute between plaintiff, who was in possession of a plot of *shamilat abadi*, and an outsider, the former executed an agreement admitting that the plot belonged to the community, and that he held subject to their good pleasure.

In 1908, four of the proprietors out of several hundreds, dispossessed him and he sued them for possession. Lower Appellate Court held, that his only remedy was a suit against the whole community for partition and dismissed the suit.

*Held—*

(i) that the suit should have been decreed, inasmuch as the possession of plaintiff under the agreement of 1883 was a substantive right, interference with which by four of the proprietors gave him a cause of action against them; and

(ii) that this Court could interfere under clause (a), section 70, sub-section (1), Punjab Courts Act, because the lower Appellate Court, by taking a wholly erroneous view of the frame of the case and of plaintiff's real claim, had committed "material irregularity."

*Application under section 70 (a) of Act XVIII of 1884 as amended by Act XXV of 1899 for revision of the decree of A. H. Parker, Esquire, District Judge, Lahore, dated the 3rd of March 1909.*

Cooper, for petitioner.

Mehr Chand, for respondents.

The judgment of the learned Judge was as follows:—

4th Nov. 1909.

JOHNSTONE, J.—This case has been wrongly decided by the lower Appellate Court, and I do not think even the first Court, though it found for plaintiff, has put the case in quite the proper and convincing way. Jhangui, plaintiff, is one of the co-sharers in *shamilat*. Defendants, four in number, are also co-sharers; and there are several hundreds more persons in the same category. In 1883 litigation arose between plaintiff and an outsider about the site in dispute and *kotha* on it, the net result of which was, that plaintiff remained on in possession as co-sharer, executing an agreement, that the site belonged to the village community and that he would occupy it subject to their good pleasure. A few months before suit the defendants forcibly took possession, and so plaintiff brought this suit.

I agree with the lower Appellate Court that the agreement aforesaid is admissible in evidence, and in this, I disagree from the first Court. But in reality this agreement helps plaintiff and not defendants. It recites that the *whole body* of proprietors are owners of the site and that plaintiff will hold so long as they allow him. This shews that he never agreed to give

up possession at the bidding of four proprietors like defendants, and never admitted that four such persons could forcibly dispossess him and leave him with no remedy but his remedy as a co-sharer. It also shows that in 1883 he was certainly in possession and, as defendants have not shewn that they were in possession more than a few months before suit, it follows that we must presume plaintiff's continuous possession from 1883 (and even before that) down to some date last year. From this, in accordance with well-known law and custom as to possession of plots of *shamilat* by individual co-sharers, it follows that defendants in forcibly dispossessing plaintiff were *qua* plaintiff more trespassers. Plaintiff's peaceful possession, under agreement and under the aforesaid law and custom, is a substantive right, the infringement of which gives rise to a cause of action; and it is not necessary for plaintiff, as the lower Appellate Court seems to think, to seek a remedy by a suit for partition. He can rightly ask the Court simply to restore his possession and this he has done. He might perhaps have sued under section 9, Specific Relief Act, but he was not bound to do so. He is right in contending that his title of *possession* is superior to defendants though they also are co-sharers in the plot.

The lower Appellate Court, I consider has by taking a wholly erroneous view of the frame of the case and by wholly misunderstanding plaintiff's real claim and its foundation, committed "material irregularity" and so revision is permissible.

I allow the revision and give plaintiff a decree for possession with costs throughout.

*Application allowed.*

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No. 14.

*Before Hon. Mr. Justice Johnstone.*

HAR NIHAL,—(DECREE-HOLDER),—PETITIONER,

*Versus*

SHAMJI MAL AND OTHERS,—(JUDGMENT-DEBTORS),—  
RESPONDENTS.

Civil Revision No. 988 of 1909.

*Execution of decree—Decree for possession—Resistance by a third party in possession—Procedure of executing Court—Difference between the old and new Code—Civil Procedure Code, 1882, section 331—Civil Procedure Code, 1908, Order XXI, rules 97, 99 and 103.*

*Held*, that where in execution-proceedings of a decree for possession, the property is found to be in possession of a third party, who resists



delivery of possession to the decree-holder, the executing Court should proceed under rules 97 and 99, Order XXI of the new Civil Procedure Code, 1908, and make a summary enquiry into the claim of the third party that he is holding possession in good faith, and pronounce a decision, leaving the aggrieved party to his remedy by suit under rule 103.

The difference in procedure between the new Code and the old Code, section 331 pointed out.

*Petition under section 70 (a) of Act XVIII of 1884 for revision of the order of Khan Bahadur Maulvi Inom Ali, Divisional Judge, Jhelum Division, dated the 26th March 1909.*

Nansuk Chand, for petitioner.

Sukh Dial and Kishori Lal, for respondents.

The judgment of the learned Judge was as follows :—

18th Nov. 1909.

JOHNSTONE, J.—In this case Shamji Mal, respondent, claims to be two-third owner of the property under consideration. Being so, he appears to have redeemed the whole from the mortgage *pendente lite*. This is, in brief, the position. Har Nihal, appellant denies Shamji Mal's *status* as two-third owner, and incidentally, of course, impugns his right to redeem and to hold as mortgagee against appellant. The first Court took the view, that in these circumstances Shamji Mal cannot have his rights adjudicated upon in these execution-proceedings, but must file a separate suit, the execution of appellant's suit meanwhile going on regardless of Shamji Mal's protests.

The learned Divisional Judge held, that the first Court should have begun by deciding whether Shamji Mal was a judgment-debtor or not, if it found he was, should have framed issues and decided all pending questions. I suppose under section 244, old Civil Procedure Code; and if it found, he was not a judgment-debtor, should have called upon appellant to explain how he could execute a decree against a man who was not a judgment-debtor.

Now, while I by no means agree with the first Court's way of putting the thing, I rather think the Divisional Judge's way is not much better. As regards Shamji Mal being a judgment-debtor, both parties before me agreed that he was not; though he was a party to the suit that ended in this decree, and I fully agree with them. It is not a matter that requires further investigation, and it need not have been remanded to the Court below for decision. I hold that Shamji Mal is not a judgment-debtor under this decree.

Shamji Mal is, *qua* the decree, a third party found in possession of the property decreed and resisting delivery of possession of it to appellant. Thus the proper order was, simply a remand to the first Court to act under Order XXI, rules 97 and 99, Civil Procedure Code, the order of 27th January 1909 of the first Court being set aside. (Mr. Sukh Dial invokes section 331, Civil Procedure Code of 1882; but considering that the first Court passed its order now under consideration after the new Code came into force, I am unable to see why the new Code should not be followed). The law appears to me to have been somewhat altered by the new Code. Under section 331, Civil Procedure Code of 1882\*; when a person other than the judgment-debtor was found in possession of the property decreed and resisted execution, the Court had to register the third party's claim as a suit between decree-holder as plaintiff and the objector as defendant and to try and determine that suit. Now under rule 99† aforesaid read with rule 97†, the Court should make a summary enquiry into the claim of the third party that he is in possession "in good faith" and pronounce a decision, leaving the aggrieved party to his remedy by suit under rule 103†. To pass from the abstract to the concrete, the first Court here should have enquired whether Shamji Mal was in possession "in good faith" or not, that is, whether he really believed he was owner of two-thirds of the property and redeemed the mortgage in good faith and so was in possession in good faith.

\*Appended to this judgment for easy reference.

†Appended to this judgment.

Thus the first Court was wrong in rejecting Shamji Mal's claim as one that could not be enquired into in the execution proceeding, and the Divisional Judge was wrong in not deciding at once that Shamji Mal was no judgment-debtor, and in not ordering the first Court to make summary trial of the issue between appellant and him.

I allow the revision and set aside the orders of both Courts below and direct the first Court to act under rules 97 and 99 as indicated above. In the circumstances the parties will bear their own costs in the lower Appellate Court and here.

*Revision accepted.*

#### *Appendix A.—Section 331.*

If the resistance or obstruction has been occasioned by any person other than the judgment-debtor claiming in good faith to be in possession of the property on his own account or on account

of some person other than the judgment-debtor, the claim shall be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant; and the Court shall without prejudice to any proceedings to which the claim may be liable under the Indian Penal Code or any other law for the punishment of such resistance or obstruction, proceed to investigate the claim in the same manner and with the like power, as if a suit for the property had been instituted by the decree-holder against the claimant under the provisions of Chapter V, and shall pass such order as it thinks fit for executing or staying execution of the decree. Every such order shall have the same force as a decree, and shall be subject to the same conditions as to appeal or otherwise.

*Appendix B. — Rule 103.*

Any party not being a judgment-debtor against whom an order is made under rule 98, rule 99 or rule 101 may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit (if any) the order shall be conclusive.

*Rule 97, Order XXI.*

(1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is made to appear and answer the same.

*Rule 99, Order XXI.*

Where the Court is satisfied that the resistance or obstruction was occasioned by any person (other than the judgment-debtor) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the Court shall make an order dismissing the application.

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## Full Bench.

No. 15.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon.*

*Mr. Justice Robertson and Hon. Mr. Justice*

*Rattigan.*

IN RE STAMP DUTY LIABLE ON A CERTAIN DEED  
EXECUTED BY M. GHULAM HAIDAR AND ABDUL  
LATIF IN FAVOUR OF THE PUNJAB BANKING  
COMPANY, LIMITED, PESHAWAR.

Civil Reference No. 50 of 1909.

*Indian Stamp Act, II of 1899, section 5, articles 40 (b) and 57 (b) — Deed of mortgage executed by mortgagor, mortgagee and surety — Stamp duty leviable on such instrument.*

An instrument purporting to be a deed of mortgage in consideration of the loan of Rs. 2,000 was executed by three parties (1) mortgagor, (2) surety for the due fulfilment of the terms of the obligation and (3) the party making the loan; and it bore a stamp of Rs. 10 as a mortgage-deed within the meaning of article 40 (b) of the Indian Stamp Act, 1899. On presentation before the Sub-Registrar at Peshawar a question arose, whether it should not in addition bear a stamp of Rs. 5, as falling also within the provisions of article 57 (b). On a reference by the Revenue Commissioner, North-West Frontier Province:—

*Held*, that the instrument in question was properly stamped, inasmuch as the subject-matter of the agreement was but one, *viz.* : the repayment of the amount of the advance, and the mere fact that there were two contracts embodied in the instrument, the one by the mortgagor and the other by the surety in respect of this matter could not bring the instrument within the purview of section 5 of the Stamp Act.

*Case referred by A. L. Tucker, Esquire, C. I. E., I. C. S., Revenue Commissioner, North-Western Frontier Province, with his letter No. 340-H, dated the 12th July 1909.*

Shadi Lal, for petitioner.

The order of the Full Bench was delivered by—

RATTIGAN, J.—This is a reference under section 57 of the 20th Nov. 1909. Indian Stamp Act, II of 1899, and clause 6 (1) (c) of the North-West Frontier Province Law and Justice Regulation VII of 1901, from the Revenue Commissioner, North-Western Frontier Province, and the question upon which the opinion of this Court is asked is one relating to the stamp duty with which a certain instrument, impounded under section 33 of the said Stamp Act, by the Sub-Registrar of the Peshawar *tahsil*, is chargeable.

The instrument in question purports to be a deed of mortgage of property in consideration of the loan of Rs. 2,000 advanced by the Punjab Banking Company to one Ghulam Haidar, the mortgagor. There are, however, three parties to the instrument, (1) the mortgagor Ghulam Haidar, (2) one Mufti Abdul Latif, a surety for the due fulfilment of the terms of the obligation, and (3), the Punjab Banking Company, the party making the loan. The instrument recites that the Punjab Banking Company has advanced the sum of Rs. 2,000 to the mortgagor; that the mortgagor and the surety jointly and severally covenant to repay the said amount together with interest, commission and lawful charges, and that in addition the mortgagor assigns to the Banking Company by way of mortgage, certain immoveable property at Peshawar.

The instrument bears a ten rupee stamp as a mortgage-deed within the meaning of article 40 (b) of the Indian Stamp Act. The question before us is, whether it should not in addition bear a stamp of Rs. 5 as falling also within the provisions of article 57 (b) of the Act. In our opinion, the instrument is correctly stamped.

The subject-matter of the agreement is but one, *viz.*, the repayment of the amount of the advance, and the mere fact that there are two contracts embodied in the instrument, the one by the mortgagor, and the other by the surety, in respect of this matter, cannot bring the instrument within the purview of section 5 of the Stamp Act. As observed in *Musa v. Kahan* <sup>(1)</sup>, the test under the Stamp Act is not whether the instrument embodies distinct contracts, but whether it comprises distinct matters. Distinct contracts are immaterial if they relate to the same transaction. A good illustration of this principle is furnished by the case of a bond with sureties in which the contracts of the principal and the sureties are written separately. It has been held that a single stamp is sufficient for both, as they relate to the same matter, though there can be no doubt that the contracts are distinct, *see Doulat Ram Harji v. Vitho Radhoji* <sup>(2)</sup> and the authorities collected therein, and *Kusha v. Sada Shirpat* <sup>(3)</sup>.

In the present case the instrument deals, as we have remarked, merely with the one matter of the loan of Rs. 2,000 and with its repayment. Both the mortgagor and the surety

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<sup>(1)</sup> 102 P. R. 1895.

<sup>(2)</sup> (1880) I. L. R. 5 Bom. 188, F.B.

<sup>(3)</sup> Bom. P. J. 1881, 305.

jointly and severally undertake liability in respect of this matter, and it would be competent to the creditor to claim the money from either the mortgagor or the surety. This being so, and there being but one consideration for the agreement, it seems to us immaterial that the repayment of the amount is secured in different ways against the two persons who undertake to liquidate the debt.

In addition to the authorities above cited we might also refer to *Shu-bu-din Mahomed v. Kirnak Rajnak* (1). In this case it was held that the instrument must be regarded as comprising sixteen distinct contracts of loan, because each one of these sixteen persons borrowed a quantity of rice from the plaintiff and executed a bond for the debt, distinctly specifying how much rice had been borrowed by each of them. There was no covenant by the obligors to repay the entire debt jointly and severally, and it was obviously for this reason that the Court held that the instrument related to separate and distinct matters within the contemplation of section 7 of Act I of 1879.

The case before us is of a different character and we cannot distinguish it from the cases dealt with in the Bombay cases above referred to and in *Musa v. Kahan* (2).

We accordingly are of opinion that the instrument was duly stamped and we direct that the record of the case be returned, to the Revenue Commissioner, North-West Frontier Province, with this expression of our opinion.

### No. 16.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge,  
and Hon. Mr. Justice Robertson.*

DIWAN SINGH,—(PLAINTIFF),—PETITIONER,

*Versus*

AMIR SINGH,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 161 of 1909.

*Civil Procedure Code, 1882, section 258—Satisfaction of decree out of Court—Suit for declaration that the decree had been satisfied—Maintainability of such suit.*

*Held*, that although section 258 of the Civil Procedure Code, 1882 specifically enacts that an uncertified adjustment can not be recognized

(1) (1886), I. L. R. 10 Bon. 47.

(2) 102 P. R. 1895.



as an adjustment of the decree by any Court executing the decree, it is implied that it may be recognized as such by a Court trying the matter as a regular suit, and therefore a suit for a declaration that the decree had been satisfied is maintainable, notwithstanding that its object is to restrain the decree holder from executing the decree.

*Petition under section 70 (a) of Act XVIII of 1884 for revision of the order of A. H. Brasher, Esquire, District Judge, Jhelam, dated the 1st December 1908.*

Vishnu Singh, for petitioner.

Devi Dial, for respondent.

The judgment of the Court was delivered by

26th Nov. 1909.

ROBERTSON, J.—The first question to be decided is—is there any ground on which a petition for revision under section 70 (1) (a) can be admitted? We think, following the authority of *Habib-ullah v. Mussammatt Fatteh Bibi* (1), Full Bench, that there is—and we overrule the objection on that point.

The facts of the case, upon which as a basis we have to decide the question before us, are as follows:—It is found on the facts that the judgment-debtor in this case satisfied the decree of the decree-holder, but such satisfaction was never certified under section 258, Civil Procedure Code. The decree-holder proceeded to execute the decree, as if it had not been satisfied. The judgment-debtor had no remedy in the decretal court, for it is expressly provided in section 258, Civil Procedure Code, that “unless such a payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any Court executing the decree.”

He therefore brought a suit for a declaration that the decree had been satisfied, and that it could no longer be executed, and the Lower Appellate Court has dismissed his suit.

The only authority brought to our notice which is entirely in point is *Azisan v. Matuk Lal Sahu* (2) and the Lower Court was justified in following it though, as explained below, we take a different view.

It is clear that when a decree has been satisfied out of Court, and not certified, the judgment-debtor can maintain an action for damages if forced to pay a second time in execution

(1) 75 P. R. 1890, F. B.

(2) (1894) I. L. R. 21 Cal. 437.

proceedings—all the authorities agree as to this—*Kesu Shiva Ram v. Ganu Babaji* <sup>(1)</sup>, *Shadi v. Ganga Suhni* <sup>(2)</sup>, *Periatambi Udayan v. Villaya Goundan* <sup>(3)</sup>, *Gururayya v. Vudiyappa* <sup>(4)</sup> does not bear upon the point before us. But in the Calcutta case two Judges (Macpherson and Pigot, JJ.) held that such a suit as the present is not maintainable if the object of the suit is to restrain the decree-holder from executing the decree. The third Judge Bannerje, J., held that as section 258 specifically enacts that an uncertified adjustment cannot be recognized as an adjustment of the decree by any court executing the decree, it is implied that it may be recognized as such by a Court trying the matter as a regular suit. With this latter view we agree. It is supported by analogy only, by our Full Bench judgment in *Atma Singh v. Banke Ram* <sup>(5)</sup>. Here the decree-holder has moved the Court to execute against the judgment-debtor. We cannot see that it is just or equitable to compel the judgment-debtor to wait until perhaps his goods have been seized and sold, leaving him to sue afterwards when the obvious course is for him to sue at once to prevent such injury. If the wrongful execution gives him a right to sue for damages, it is reasonable to hold that the attempt to cause such wrong may be restrained at any rate as soon as any overt act is done towards causing such wrongful damage. In our opinion the suit will lie. We accordingly set aside the judgment of the Divisional Judge and return the appeal for decision on its merits. Costs to be costs in the cause.

*Appeal accepted, case remanded.*

## No. 17.

*Before Hon. Mr. Justice Johnstone.*

HIRU AND OTHERS,—(DECREE-HOLDERS),—APPELLANTS,

*Versus*

GURCHARN,—(JUDGMENT-DEBTOR),—RESPONDENT.

Civil Appeal No. 1182 of 1908.

*Civil Procedure Code, 1882, section 230.—Execution of decrees—Limitation—Continuation of previous application for execution—Fraud.*

Where an application for execution of a decree was made on the 11th May 1906 by attachment and sale of moveable property, which was fully attached and sold, but the money was not paid to the decree-holder owing

<sup>(1)</sup> (1899) I. L. R. 23 Bom. 502.

<sup>(3)</sup> (1898) I. L. R. 21 Mad. 409.

<sup>(2)</sup> (1878) I. L. R. 3 All. 538.

<sup>(4)</sup> (1895) I. L. R. 18 Mad. 26.

<sup>(5)</sup> 29 P. R., 1908 F. B.

to an appeal filed by the judgment-debtor, nor had the application ever been definitely struck off the file or consigned to the record-room, and other applications were made on the 10th March and 15th June 1908 for attachment and sale of *houses* not mentioned in the application of 11th May 1906—

*Held*, that the applications of 1908 were fresh substantive applications and not merely continuations of the former application.

*Held*, also, that it is doubtful whether it is open to the decree-holder to raise questions of fraud and claim the benefit of the last sentence of section 230, Civil Procedure Code, 1882, for the first time in appeal, and that the mere fact that the judgment-debtor filed an appeal in connection with the execution proceedings in 1906 did not constitute fraud.

*Miscellaneous Appeal from the order of H. F. Forbes, Esquire, District Judge, Kangra, dated the 17th August 1908.*

Sukh Dial, for appellant.

Tek Chand, for respondent.

The judgment of the learned Judge was as follows :—

30th Nov. 1909.

JOHNSTONE, J.—Before the District Judge in this case apparently the decree-holder urged that his decree was still capable of execution on one ground only, namely that his applications for attachment of houses put in on 10th March 1908 and 15th June 1908 were not fresh substantive applications for execution but merely continuations of the application of 11th May 1906, which had never been formally consigned to the record-room or struck off the file. Here the decree-holder repeats that ground and adds another, namely, that the judgment-debtor's past conduct amounts to fraud, and so decree-holder has the benefit of the last sentence of section 230, Civil Procedure Code (1882.) These points have been argued before me at some length by Mr. Sukh Dial; but after careful consideration, and without calling upon Mr. Tek Chand to reply, I have arrived at the conclusion that neither position is tenable.

As regards fraud, it is doubtful whether it is open to the decree-holder to raise such a question for the first time in appeal; and further I can find no evidence of fraud on the record.

Mr. Sukh Dial refers me to the case which came upon appeal before Reid, J., and contends that judgment-debtor was guilty in that litigation of frivolous and vexatious obstruction of the execution of this decree. I cannot agree as to this. In my opinion judgment-debtor was in the circumstances justified in obtaining an adjudication from the Courts on the very difficult question of his relations with his father, and I observe that Reid, J., by no means denounced judgment-debtor's assertions as false or frivolous but merely wrote that he had not succeeded in discharging the burden of proof that was upon



him. Then the rulings *Rai Sham Kissen v. Damar Kumari Debi* (1) and *Pattakara Annamalai Goundan v. Ramgasami Chetti* (2) do not square with the present case in the matter of facts. In the former a false and frivolous application was made under section 108, Civil Procedure Code (1882); and in the latter there were evasions of service of notices and several applications whose object could only have been to delay proceedings.

As to the other point, I cannot see how an application in 1908 to attach houses can possibly be taken to be a continuation of an application of 11th May 1906 to attach moveable property, which was all duly attached and sold by auction. No doubt the earlier application had never been definitely struck off the file, probably because in consequence of the aforesaid appeal to Reid, J., the money had not been actually paid over to decree-holder. In my opinion the application of 1908 to attach houses not mentioned in the application of 11th May 1906 were substantive applications and not merely steps to carry on an existing and pending application; and Mr. Sukh Dial has not been able to show me any authority to the contrary. In *Rahim Ali Khan v. Phul Chand* (3), it was a case of successive applications to sell property already under attachment. In *Jit Mal v. Jwala Prasad* (4), it was ruled that a warrant for arrest of a judgment-debtor does not necessarily lapse, because when first issued it fails of execution. In *Mul Chand v. Muhammad* (5), it was held that an application for attachment of property may remain in force *as regards that property*, and persistent and repeated applications to enforce it are not fresh substantial applications for execution. In *Gurudeo Narayan Sihna v. Amrit Narayan Sihna* (6), the same kind of rule was laid down where fresh steps were taken against the same property.

In *Bishan Singh v. Ganga Ram* (7), discussed by the Court below the facts are peculiar. Decree-holder applied for arrest of judgment-debtor and apparently vaguely, for attachment of land. It was held that a later application giving details of the land and asking for attachment of it was not a fresh substantive application for execution but a mere continuation of the original application.

It is clear that none of these rulings militates against my view.

For these reasons I dismiss the appeal with costs.

*Appeal dismissed.*

(1) (1906-07) 11 Cal. W. N. 440.

(4) 45 P. R. 1909.

(2) (1883) I. L. R. 6 Mad. 365.

(5) (1899) I. L. R. 21 All. 155.

(3) (1896) I. L. R. 18 All. 482, F.B.

(6) (1906) I. L. R. 33 Cal. 689.

(7) 27 P. R., 1905.

## No. 18.

*Before Hon. Mr. Justice Rattigan and Hon.  
Mr. Justice Shah Din.*

DASOUNDA SINGH,—(PLAINTIFF),—APPELLANT,

*Versus*

MANGAL AND OTHERS,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1298 of 1908.

*Custom—Succession—Collateral residing in another village or village  
proprietary body—Escheat—Onus probandi.*

*Held*, that a nephew of a deceased proprietor who does not reside in the village where the deceased left land and is not a proprietor in it, succeeds to his uncle's property in preference to the proprietors of the villages—And that the initial *onus*, generally speaking, would lie on the proprietary body to show that they had a right to exclude a near agnatic relative of the deceased owner from the inheritance.

*Held* also, that a right of escheat to the proprietary body cannot be presumed to exist; it must be affirmatively proved.

*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 12th November 1909.*

Dwarka Das, for appellant,

Morrison, for respondent.

The judgment of the Court was delivered by

26th Nov. 1909.

SHAH DIN, J.—The pedigree table given at page 3 of the printed paper book will help to an understanding of the case.

The plaintiff Dasounda Singh, claiming to be the nephew of Albel Singh, sues for possession of the land left by Mussamat Bholi, widow of Nathu, son of Albel Singh, on the ground of his agnatic relationship to the said Nathu, and alleges that the defendants who are the proprietors of the village of Mohla Mazra, in which the land is situate, have taken unlawful possession of the same. In answer to the plaintiff's claim, the defendants deny the alleged relationship of the plaintiff to Albel Singh and plead *inter alia* that the land was given to the latter by their ancestors, though they do not know when it was so given and for what purpose, and that as the widow of the last male holder has died the land reverts to them (the defendants) as successors in interest of the original donors.

Upon the pleadings of the parties, the first Court framed a number of issues, of which the first three were the most

material, and having found on those issues in favour of the plaintiffs it decreed the claim.

On appeal the Divisional Judge remanded the case under section 566 of the Civil Procedure Code of 1882 for further enquiry on four issues, which are set out in his order, dated the 11th July 1908, in the course of which he observed :—

“ The chief issue will probably be whether plaintiff has a reversionary right in the land acquired by Albel Singh in a foreign village.

“ If Albel Singh purchased the land, plaintiff (if a collateral) would appear to have a clear right to succeed. But if the land was given to Albel Singh, it would presumably revert to the donors, *i. e.*, the proprietary body, on failure of the direct heirs of the donee.”

The return made by the first Court to the order of remand is not quite clear as to the findings recorded on the issues framed by the Divisional Judge for re-trial, though it would seem that the Court meant to find (1) that the plaintiff was not proved to be a collateral of Albel Singh ; (2) that there was no proof of Albel Singh having acquired the land in suit by purchase ; (3) that it was equally unproved that it had been given to him by the ancestors of the defendants ; and (4) that if the plaintiff is not held to be a collateral of Albel Singh, he would have no right to succeed to the land in question.

After receipt of the above return the Divisional Judge agreed with the findings Nos. (2) and (3) set out above, but held, differing from the first finding that the plaintiff was the nephew of Albel Singh. On the question of the plaintiff's right of succession to the land in dispute, he held that the plaintiff had no such right, principally on the ground (if we correctly understand the judgment of the learned Judge on this point, which is far from clear) that as the plaintiff is neither a resident of, nor a proprietor in, the village in which the land is situate, he has by custom no right to succeed to it merely on the strength of his agnatic relationship to Albel Singh, who originally held the land, and that it escheats to the proprietary body of the village. On this ground the first Court's decree was reversed and the plaintiff's suit dismissed as being unmaintainable.

In further appeal, the case has been fully argued on both sides ; and after giving our best consideration to the contentions of the respondents' counsel, we think that the view taken by the



Divisional Judge is incorrect, and that the plaintiff's claims must be decreed.

On the question of the plaintiff's relationship to Albel Singh, we have no hesitation in agreeing with the Divisional Judge. Four of the present defendants were parties to the suit of 1886 referred to in the judgments of the Courts below, and in that suit it was held that the present plaintiff was a nephew of Albel Singh. As against these defendants therefore the point is *res judicata* and cannot be re-opened. As to the remaining defendants, it seems to us that the statements of Mussammat Basso, daughter of Albel Singh, and Mussammat Bholi, widow of Nathu, in the litigations of 1886 and 1894, to which reference has been made by the Divisional Judge, are certainly relevant on the question of the plaintiff's relationship, and when considered along with the oral evidence produced in this case, sufficiently prove that he is the nephew of Albel Singh.

The plaintiff is therefore a very near collateral of Albel Singh, who is shown in the revenue papers as owner of the land in dispute so far back as 1856. It is not proved that this land was gifted to him by the ancestors of the defendants, as specifically pleaded by them in answer to the plaintiff's claim, nor, on the other hand, is it shown that it was purchased by him. He was married in the village of the defendants, though the exact date of the marriage is not known, and he settled there and remained in possession of the land in dispute till his death. His village of origin is only a few miles from the village of adoption, though the defendants profess (in their pleas) absolute ignorance as to his original place of residence and do not know who his father was.

The learned Divisional Judge, after holding it unproved "whether Albel Singh got the land as son-in-law of Rutal and "by gift from him or by a grant from the whole proprietary "body," and after remarking that the village of the defendants, who are Birk Jats, is fairly homogeneous, goes on to observe as follows :—

"It may then be *assumed* that the grant to Albel Singh, "was either made by the Birks as a body, or by the donor and "father-in-law of Albel Singh with their assent. It may then "be *presumed* that the intention was to limit the grant to Albel "Singh's direct lineal descendants."

The italics are ours. The presumption made by the learned Judge would seem to follow from the assumption which precedes

it, and it is upon this assumption, in support of which there is on the record not a shred of reliable evidence, that the decision adverse to the plaintiff's claim is based. We may at once say that the assumption so made, begs the whole question and decides in favour of the defendants the only material issue in the case, in respect of which the *onus* of proof lay on them, without their adducing the necessary evidence in discharge thereof. Upon the pleadings of the parties the most important point on which they were at issue was, whether the defendants' ancestors had, as a fact, gifted the land to Albel Singh and thus settled him in the village, and as the defendants had admittedly failed to prove that fact both before and after the remand, no assumption could and should have been made in favour of the alleged gift giving rise to a presumption as to the terms on which the subject-matter of the gift or grant was to be held by Albel Singh. The learned Divisional Judge observes towards the conclusion of his judgment that his "decision comes to this, that underlying all "theory of agnatic succession is the tacit assumption that "agnatic kinship must be accompanied by membership of a "village community to give rise to any rights of succession": and he ends by candidly admitting that "if that is correct, the "result is somewhat startling."

And so it is. But the result would by no means be startling if the case be decided in accordance with the opinion of the majority of the judges in *Daya Ram v. Soheli Singh* (1), of which the full significance does not seem to have been grasped by the Divisional Judge, though he has noticed the ruling in his judgment, (see pp. 406, 407, 410 and 424 of P. R. for 1906). At p. 424 Chatterji, J., says :

"If the village proprietors have not the right of reversion, "I cannot understand how a deceased owner's agnate, *e. g.*, "his brother, can be denied his right of inheritance on the "ground of non-residence and non-proprietorship in the village. "If there is a rule of this character, it must follow that under "the above circumstances the acquired agricultural land of a "person must go ownerless on his death and be the lawful prey "of any one who chooses to squat on it. I have not been able to "trace the existence of any such rule in the published "decisions. \* \* \* \*"

Robertson, J., at p. 410 of the report approves of the above expression of opinion and observes :

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(1) 110 P. R., 1906, F. B.

"I concur with my brother Chatterji that an agnatic relation is not usually barred from succeeding to the self-acquired land of a deceased relative because he resides in a different village. It lies upon the person who asserts that he is so barred to prove the truth of the contention."

From these extracts it is clear that under circumstances similar to those of the present case the initial *onus*, generally speaking, would lie on the proprietary body to show that they had a right to exclude the agnatic relation of the deceased owner from inheritance in respect of the land left by the latter in his village of adoption, in which such relation was neither a resident nor a proprietor. Different considerations would, of course, govern the question of the adjustment of *onus*, if the defendants in possession happened to be the blood relations of the deceased owner, *e. g.*, his daughters or sisters, or their sons. That is not the case here, and the rule of *onus* as laid down above must therefore be applied. Applying that rule, the defendants can only be treated as trespassers with no title that can compete with that of the plaintiff and the latter's claim must succeed.

Towards the close of his argument, the defendants' counsel asked for a remand to enable his clients to prove the existence of a special custom by which they have a superior title to succeed to the land in suit as against the plaintiff. But the defendants have had ample opportunity for adducing all available evidence on the point of custom, if one existed in their favour, and no good grounds have been shown for granting them a remand for this purpose.

As to the alleged right of escheat possessed by the proprietary body as such, it is sufficient to say that the defendants in this case never expressly relied on any such right in their pleas, and they cannot therefore avail themselves of this defence. Assuming, however, that they could be allowed to set up such a defence in appeal, the decisions of this court in *Shaman v. Sardha* <sup>(1)</sup>, *Rukan Din v. Mussammat Mariam* <sup>(2)</sup>, *Chet Singh v. Samand Singh* <sup>(3)</sup>, *Kala Singh v. Norain Singh* <sup>(4)</sup>, *Bishen Singh v. Bhagwan Singh* <sup>(5)</sup>, *Harnam Singh v. Partab Singh* <sup>(6)</sup>, *Nihala v. Rahmatullah* <sup>(7)</sup>, are authorities in favour of the

(1) 61 P. R. 1898.

(3) 78 P. R. 1898.

(5) 28 P. R. 1904.

(2) 68 P. R. 1898.

(4) 75 P. R. 1902.

(6) 102 P. R. 1906.

(7) 137 P. R. 1908.



plaintiff's contention that the alleged right of escheat cannot be presumed to exist in a case like the present and must be affirmatively proved to inhere in the proprietary body in each particular case, no such proof has been adduced in this instance, and in the absence of such proof the plaintiff's title based upon his right of agnatic succession must prevail.

We accordingly accept this appeal, and reversing the decree of the lower Appellate Court restore that of the first Court with costs throughout.

*Appeal accepted.*

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**No. 19**

*Before Hon. Mr. Justice Rattigan and Hon.  
Mr. Justice Shah Din.*

CHAUDHRI KUDAN MAL AND OTHERS,—(PLAINTIFFS),—  
APPELLANTS,

*Versus*

SARDAR ALLAH DAD KHAN, AND OTHERS,—  
(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 1336 of 1907.

*Civil Procedure Code, 1882, section 43 (Order II rule 2 of new Code)—previous suit for interest only after expiry of term of mortgage—second suit for subsequent interest barred.*

Where a mortgagee after the date of expiry of the mortgage term sued only for the interest due and not for the principal though both principal and interest were then payable—

*Held*, that he was precluded by the provisions of section 43 of the Civil Procedure Code, 1882, from suing for the principal subsequently. Interest being accessory to the principal it follows that a subsequent suit for interest, although accrued due after the decision of the previous suit, is equally barred if the claim for the principal is barred.

*Ganga Ram v. Abdul Bahman* <sup>(1)</sup>, followed—*Vashvant Narayan Kamat v. Vithal Divakar Parulikar* <sup>(2)</sup>, differed from.

*First Appeal from the decree of Rai Kidar Nath, District Judge, Muzaffargarh, dated the 16th July 1907.*

Dwarka Das and Chuni Lal, for appellants.

Mohammad Shafi, for respondents.

The judgment of the Court was delivered by—

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<sup>(1)</sup> 23 P. R. 1907.

<sup>(2)</sup> (1897) I. L. R. 21 Bom. 267.

19th Nov. 1909.

RATTIGAN, J.—The facts of this case are as follows :—On the 30th December 1884, Nawab Muhammad Rahnawaz Khan mortgaged, without possession, certain *mahsul* dues and his share in certain *ala* and *adna* proprietary rights in lands in *Manza* Lalpur to one Chaudhri Lakhū Ram for a sum of Rs. 8,700. This sum of Rs. 8,700 was made up as follows :—

	Rs.
(a) Due on a bond, dated 26th March 1883 ...	6,300
(b) Interest for five months and 17 days ...	439
(c) Balance due on certain loans ...	25
(d) " Now received in cash " ...	1,936
Total ...	8,700

{ As regards item (d) we may note in passing that at the time of registration, the mortgagor did not admit before the Sub-Registrar the receipt of actual cash for that item. The endorsement is to the effect that the mortgagor admitted that Rs. 6,764 had been credited towards a previous debt, that Rs. 436 had been received in cash, and that he had received a *hundi* on one Nain Das for Rs. 1,500.

The terms of the mortgage, so far as they are material for the purposes of the present appeal, were to the following effect :—

" I, the mortgagor, shall remain in possession of the " mortgaged shares as before. In lieu of the interest, the " mortgagee shall receive Rs. 1,445 annually, on account of " *bila kasur* and *mahsul* dues and cash, up to the date of re- " demption, as under :—

	Rs.
" On the 1st Har ( <i>i.e.</i> , June) for <i>rabi</i> harvest	1,000
" On the 15th Poh ( <i>i.e.</i> , January) for	
<i>khariif</i> ... ..	445

" The term is fixed for five years. I am at liberty to redeem " the land on payment of the mortgage money with interest, " on account of fixed *kasur* dues for the expired period before " the expiry of the said period. The mortgagee shall not be " competent to demand, within the stipulated period, the amount " of the mortgage money, excepting the fixed *kasur* dues. After " the expiry of the term, he shall be competent to recover the " principal mortgage money, or to continue receiving the fixed

"kasur dues . . . It is noted that if at any time after the  
"expiry of the term, the mortgagee wishes to recover the  
"mortgage money, he is authorized first to recover this sum  
"from the income of the mortgaged property and from the  
"property itself. The balance, if any, shall be recovered from  
"me as well as from my other property. If, according to any  
"law, no remedy can be sought in respect of the property in  
"Mauza Lalpur, the money can be recovered from my person  
"and other property . . . The money on account of the  
"interest fixed above, shall be chargeable from the income  
"and produce of the property mortgaged. If it is not receive-  
"able therefrom, then I shall be liable therefor."

It is clear from these provisions that the mortgagee was entitled to claim payment of the principal sum after the expiry of five years from the date of the mortgage, and it would seem that the interest was duly paid for the first five years. Mr. Muhammad Shafi, on behalf of the respondents, asserted that this was the case and that the sum of Rs. 5,780 had been actually paid to the mortgagee by way of interest for that period. Mr. Dwarka Das, for the mortgagee, when replying to Mr. Shafi's arguments, did not attempt to contravert this statement.

In 1897 the mortgagee brought a suit against the mortgagor for recovery of interest due under the terms of the mortgage for the period from January 1889 to June 1897, and obtained a *personal* decree against the mortgagor for the sum of Rs. 12,810. It is not contended that this decree has not been fully satisfied, and we may take it, therefore, that the mortgagee has recovered a total sum of Rs. 18,590 from the mortgagor in respect of interest due on the mortgage-deed.

The present claim is for recovery of the sum of Rs. 8,670, alleged to be due by way of interest from the 14th June 1900, up to the 15th *Poh*, *Sambat* 1962 (29th December 1905), and it is admitted in the plaint that interest due from the 15th *Poh*, *Sambat* 1954, to the 15th *Poh*, *Sambat* 1956, cannot be claimed by reason of the limitation law. Plaintiff asks that a decree for the said sum of Rs. 8,670 be passed in his favour against defendants with a declaration that the "mortgaged property  
"is liable for payment thereof; in other words, that the repre-  
"sentatives of the original mortgagor cannot make any sort  
"of alienation of the said property, and that the other property  
"of the deceased mortgagor is also liable for the reason that  
"the deceased mortgagor had made himself personally liable for  
"payment of the money."



Defendants who represented the original mortgagor, urged numerous pleas in objection to the claim, but with these it is unnecessary for us to deal, as plaintiff's suit has been dismissed by the District Judge on a preliminary point. The learned Judge, relying upon the decision of this Court reported as *Ganga Ram v. Abdul Rahman* (1), has held that inasmuch as any suit by the mortgagee to recover the principal amount of the mortgage debt, would be barred by reason of the provisions of section 43 of the old Civil Procedure Code (which corresponds to order II, rule 2 of the new Code), a suit by the mortgagee to recover interest on such principal must, in reason, be held to be equally barred.

From this decree the mortgagee has appealed to this Court, and on his behalf his learned pleader has urged (1) that this case is distinguishable on its facts from the ruling relied upon by the District Judge, and (2) that even if this be not so, the ruling in question is erroneous. It is further urged, that in the event of the first two contentions being decided adversely to the appellant, the decision appealed against is nevertheless erroneous inasmuch as the mortgagee is at all events entitled to claim interest due on his mortgage, although he may not in law be entitled to claim the principal amount of his mortgage debt, and it is pointed out that in the present case the claim is for interest only, and that such interest accrued due after the decision of the former suit in 1897 and that consequently section 43 of the old Civil Procedure Code has no applicability.

In our opinion neither contention is tenable. As regards the first argument Mr. Dwarka Das argued that upon the true construction of the mortgage contract, an option was given to the mortgagee of either suing after the expiry of five years for the principal sum due on his mortgage together with all arrears of interest, or of electing to go on under the terms of the mortgage and suing merely for the interest thereon. In other words, that the mortgagee was not bound at the expiry of the said term to sue for the principal sum, but could elect to sue merely for the interest then due, and that in the event of his electing to sue merely for the interest, he would under the terms of the contract be still entitled to sue thereafter either for the principal sum or for future interest.

In our opinion, this argument is based upon an erroneous reading of the mortgage-deed. That deed distinctly states that

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(1) 28 P. R. 1907.

the term of the mortgage is to be five years and provides that upon the expiry of that term the mortgagee "shall be competent to recover the principal mortgage money, or to continue receiving the fixed *kasur dues*." As we read this provision, the meaning is that when the five years have elapsed, the mortgagee can, if default has been made in the payment of the interest, at once sue for recovery of the principal amount, or if no such default has been made, he can allow the mortgage to continue and go on receiving the interest as he has done in the past.

But assuming that this is not the right construction, we are still faced with this difficulty in accepting the mortgagee's contention, that after the expiry of the five years it was undoubtedly, and admittedly, open to the mortgagee to sue for recovery of the principal amount. Mr. Dwarka Das argues that though the mortgagee was *entitled* to sue for that amount, he was not bound to do so, and that by agreement of the parties, he was given the right to elect, whether he would sue for the principal amount or merely for the interest. In support of this argument he urges that the mortgage-deed makes separate and distinct provision for the recovery of the principal sum and for recovery of the interest alone, and that while the former is chargeable against the mortgaged property, the latter is a charge only on the produce and income of that property. That this latter subtle distinction is a mere after-thought suggested by the learned pleader's own ingenuity, is obvious from the fact that in the plaint, the mortgagee asks that the amount claimed by him by way of interest should be made a charge on the mortgaged property. Mr. Dwarka Das tried to make little of this claim and urged that his client should not be prejudiced because he asked too much. We do not wish to press the matter against the mortgagee, but it is impossible to ignore the fact that he himself did not apparently read the mortgage-deed in the same way that his learned pleader would have us construe it.

This, however, is comparatively a minor detail and the main question before us is whether the mortgagee, when he sued in 1897 for recovery of interest due to him, was *bound* by law to sue for recovery of every item then due to him on the same cause of action. There was only one contract between the parties, and that contract dealt specifically with the claims for interest and for recovery of the principal debt, and we are unable to distinguish the present case from that reported as

*Ganga Ram v. Abdul Rahman* (1). In that case also liberty was given to the mortgagee (after expiry of the fixed period) to sue for unpaid interest or compound interest, or to sue for the same along with the principal, and in dealing with this question, the Court remarked, "when principal and interest are both due, the section (*i.e.*,) section 43, Civil Procedure Code) says, there can only be one suit for both. This cannot be overridden by an agreement between the debtor and the creditor that separate suits might be brought." In our opinion, after the date of the expiry of the mortgage term, the mortgagee's cause of action in respect of the recovery of the principal sum and of the interest due under his contract was one and the same, and he was consequently bound by law to include the whole of his claim in respect of that cause of action in the suit which he brought in 1897. He was, at the time, certainly entitled to claim recovery of the principal amount, and as he elected not to do so, it seems to us that he is now precluded by the provisions of section 43 of the old Code (Order II, rule 2 of the new Code) from suing for that principal amount. It is true that the decision of the Bombay High Court *Shri Shailapa Hailapa v. Balapa Lakana* (2) and *Vashvant Narayan Kamat v. Vithal Divakar Parulikar* (3) are to some extent against this view, but we are ourselves of opinion, though with every respect, that the ruling laid down in *Ganga Ram v. Abdul Rahman* (1) is the more correct in law. In the earlier Bombay case no reasons are given in support of the *ratio decidendi* and the latter case is fully discussed in the judgment of this Court. We cannot assent to the proposition that it is open to parties by agreement *inter se* to override the rule laid down by the legislature as regards splitting of causes of action. Mr. Dwarka Das's argument would admittedly carry us to this extreme that A who owes B Rs. 100, payable on the 1st June, can by agreement allow B to sue him on the 2nd June for Rs. 5, on the 3rd June for another Rs. 5, and so on every day until the full sum is recovered. We need hardly point out that a case of that kind, in which the cause of action accrues on one date in respect of the whole amount due from A to B, is essentially distinct from a case where under the terms of the contract between the parties the various items constituting the whole debt, are expressly made payable on different dates. In the case before us, it was expressly provided that the term of the mortgage was to be five years and that upon the expiry of that term it should be competent to the mortgagee to

(1) 28 P. R. 1907.

(2) (1883) I. L. R. 7 Bom. 446.

(3) (1897) I. L. R. 21 Bom. 267. *See*



recover the whole of the principal amount. When therefore he sued in 1897 for recovery merely of arrears of interest, it was open to him to sue also for the principal amount of the debt and both claims would obviously have been based upon the same cause of action. Being entitled to claim the principal amount in that suit, he was, in our opinion, bound by law to claim it. In this connection we may observe that Mr. Dwarka Das made no serious attempt to argue that the two claims were based upon different causes of action. He did, no doubt, attempt to draw a distinction between the right to recover the principal sum and the right to recover interest thereon, but in view of the fact that the plaintiff made no such distinction, he was under considerable difficulty in maintaining his position and very naturally laid greater stress upon the argument that his client, though entitled to claim recovery of the principal sum when he sued in 1897, was not in law bound to do so. Upon this latter point *Ganga Ram v. Abdul Rahman* (1), is an authority distinctly in point, and with it we entirely agree. We hold, therefore, that after the suit instituted in 1897, it is not open to the mortgagee to claim recovery of the principal amount due on his mortgage. The next question is whether in the circumstances plaintiff's present claim for interest that accrued, due after the decision of the 1897 case, is entertainable. To this claim the provisions of section 43 of the old Code of Civil Procedure are obviously not applicable, as the cause of action accrued after that case was decided. But in our opinion this claim is equally unentertainable. Assuming that the principal amount cannot be legally recoverable, are we to hold nevertheless that the interest thereon can be recovered by process of law? It seems to us that there can be only one answer to a proposition thus stated. If the plaintiff has no legal right to demand payment of the principal amount of his debt, he has, *a fortiori*, no right to claim interest thereon, and this was actually so decided by a Division Bench of this Court in Civil Appeal No. 662 of 1902. The maxim of the Roman Law, "*res accessoria sequitur rem principalem*" is in point, and it has been held in England (upon this general principle) that "interest of money is accessory to the principal" and must, in legal language, follow its nature; and therefore, "if the plaintiff in any action is barred from recovering the principal, he must, as a rule, be equally barred from recovering the interest." (Broom's Legal Maxims, 7th edition, page 370). This is unquestionably the general rule and was recognised by

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(1) 28 P. R. 1907.

the Court of Appeal in the case of *Paris Banking Company v. Yates* <sup>(1)</sup>, though in that case upon very peculiar circumstances the Court held, that interest was recoverable although the right of action in respect of the principal was barred. It appeared that the defendant in the case had guaranteed the plaintiffs, a banking company, payment of all moneys which might be owing to them in account with a customer with interest, commission and banking charges, and it was provided that the guarantee should be a continuing guarantee and should not be withdrawn except by a six months' written notice from the guarantor. The plaintiffs made advances to the customer by honouring his overdrafts from time to time down to a period more than six years before the action; but made no advances subsequently to that period, and the customer paid in sums to his account with the bank against his liability from time to time down to a period within six years before the action. At the end of each half-year the plaintiffs debited him in account with the interest for the half-year on the amount owing by him from time to time and carried forward the balance to his debit owing at the commencement of the next half-year. It was held on these facts that plaintiffs' right of action upon the guarantee in respect of the sums advanced by them to the customer was barred by the Statute of Limitations, but that the action was maintainable in respect of the interest which had accrued due from the customer within 6 years before the action and had not been paid. Clearly this was a very different case from the present, and the ground upon which the interest was decreed appears from the argument of the counsel for the plaintiffs who contended that "the interest meant by the guarantee is " the interest on the balances due from the defendant from time " to time on the account; it does not mean interest as accessory to " principal due on the guarantee; it means the items of fresh debt " that accrue from half-year to half-year against the principal " debtor as the consequence of the Bank's forbearance to sue him. " These items are guaranteed as well as the advances."

The Lords Justices accepted this argument, the tenor of which was that the defendant had guaranteed payment of two things: (1) the payment of all advances made to the principal debtor, and (2) the payment of interest, etc., upon such advances. Upon his contract, the defendant was obviously not relieved of his obligation to pay for interest upon the advances made to the

<sup>(1)</sup> (1898) 2 Q. B. 400.

debtor because the Bank was unable to recover the actual advances. As observed by the Master of the Rolls "the doctrine that interest is an accessory which falls to the ground with the principal, does not apply to a case like this, because the payment of interest, etc., is as much guaranteed as payment of the sums advanced themselves." In other words, in this case there was a contract between A and B to the effect that B would guarantee payment to A in respect of (1) all advances made by A to X, and (2) interest due from X to A in respect of all such advances. There was thus a twofold obligation on his part, and the mere fact that A's claim in respect of the advances made to X was time-barred, did not relieve B from that part of his agreement to repay A all sums due by way of interest on such advances, if such interest was recoverable and not also barred. This case was decided upon the terms of the contract of guarantee and the Court clearly and admittedly did not intend to decide contrary to the general rule, that when under one and the same contract A owes B a principal sum of money and also interest thereon, B is not entitled to recover interest if his right to recover the principal is barred. To decide otherwise would be to hold that B can continue for ever to claim interest from A, unless A consents to pay the principal amount which, *ex-hypothesi* is not legally demandable from him.

To take the present case as a concrete example. We have held that plaintiff's claim to recover the principal amount of the mortgage debt is barred under the provisions of the Civil Procedure Code. He cannot, therefore, recover this sum of Rs. 8,700. But, if we are to accept Mr. Dwarka Das' argument, it would still be open to plaintiff to recover year by year the sum of Rs. 1,445 by way of interest until such time as the mortgagor was compelled by these means, to pay up a sum which legally he was not bound to pay. We cannot believe that such is the law. On the contrary, we accept the general rule as laid down above that the "accessory follows the principal" and that (save in such exceptional cases as the one to which we have referred, and which is obviously clearly distinguishable on its facts) a creditor whose right to recover the principal amount is barred by any provision of law, is not entitled to go on claiming interest on that irrecoverable principal. Following the decisions of this Court cited by us (*Ganga Ram v. Abdul Rahman* (1) and Civil Appeal 662 of 1902), we dismiss this appeal with costs.

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(1) 28 P. R. 1907.



## No. 20.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice  
Shah Din.

JAIMAL SINGH AND NEHAL SINGH,—(PLAINTIFFS),—  
APPELLANTS,

*Versus*

GURMUKH SINGH AND OTHERS,—(DEFENDANTS),—  
RESPONDENTS.

Civil Appeal No 1143 of 1908.

*Limitation—starting points of, on pleadings—Grant of shamilat land  
by Government—succession of, on death of grantee.*

By a *sanad*, dated 14th April 1862, of the Government of the Punjab in favour of K. S. certain land out of the *shamilat* of village T. was granted to the grantee rent-free for life, and it was stipulated that the proprietary right was to remain in the family of the grantee on his demise subject to assessment. No compensation was paid by Government to the proprietary body and the land continued to be entered in the revenue papers as *shamilat*, K. S. and his widow after his death being shown only in the cultivating column. The brothers of K. S. had not cultivated any of the land, nor did they form a joint family with K. S. in 1862. On the death of K. S. and his widow the plaintiffs, proprietors in the village, claimed the land as *shamilat* and the defendants, nephews and grandnephews, claimed it as members of the family of K. S. with whom the proprietary right was to remain after his demise.

*Held*, that under the circumstances of the case the word "family," as used in the *sanad*, must be taken to be employed in its restricted sense, i.e. as meaning the wife and children, and not all the blood relations, of the grantee.

*Held also*, that as the plaintiffs in their plaint alleged that shortly before the suit they had asked the defendants, who are also members of the proprietary body, to retain possession of the land in suit which is *shamilat*, only to the extent of their own shares, but that they had refused to do so, and as the defendants did not in their pleas challenge the correctness of this allegation, the plaintiffs' cause of action really accrued, not on the death of K. S. or his widow, but when the defendants were asked to give up the area in excess of their shares in the land, and limitation only run from that date, and not from the death of K. S. or of his widow.

*Further appeal from the decree of L. H. Leslie-Jones, Esquire,  
Divisional Judge, Ferozepur Division, dated the 6th July 1908.*

Duni Chand, for appellants.

Kharak Singh, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—This appeal and the connected appeal No. 11 26th Nov. 1909. of 1909, which arise out of two suits relating to the same subject-matter, have been argued together and will be disposed of by one judgment.

The facts are very fully stated in the judgments of the Lower Courts and it is unnecessary to repeat them here. The main controversy in both the appeals relates to the proper construction to be placed on the words of the *sanad*, dated the 10th April 1862, under which *Daffadar* Kahan Singh, deceased, under whom the defendants claim, held the land in dispute. Towards the close of his argument on the merits, the pleader for the respondents raised the question of limitation, urging that in the suit out of which the present appeal (No. 1143 of 1908) has arisen, Ram Singh was made a defendant on the 6th January 1906, and that as under section 22 of the Indian Limitation Act of 1877, the suit must be taken to have been instituted against him only on that date, it was barred by efflux of time, so far as he was concerned, the plaintiff's cause of action having arisen at latest on the death of Kahan Singh's widow in October 1892. Indeed, he went further and argued that as the cause of action which had accrued to the plaintiffs was a joint one against all the defendants, including Ram Singh, that therefore their suit which was barred by limitation against Ram Singh was so barred as against all the defendants. As regards the other suit, out of which appeal No. 11 of 1909 has arisen, it was contended that the plaintiffs' cause of action had accrued not later than October 1892, when Kahan Singh's widow died, and that, therefore, the suit having been instituted in February 1906, was clearly barred by time.

Dealing first with the question of limitation thus raised, we may at once say that having referred to the plaints in the two suits we think that the plea of limitation is not made out and must be overruled. In the earlier suit, which was instituted in 1899, the allegation in the plaint as regards the accrual of the cause of action is, that shortly before the suit was filed the plaintiffs had asked the defendants, who are members of the proprietary body in the village, to retain possession of the land in suit which is *shamilat deh*, only to the extent of their own shares therein, but that they had refused to do so. The defendants did not in their pleas challenge the correctness of this allegation, or ask that particulars as to time when the demand and the refusal were made should be given by the plaintiffs; and that being so, we must take it that the plaintiffs' cause of action really

accrued, not on the death of Kahan Singh or that of his widow, but when the defendants, who being co-sharers in the land in dispute as part of the *shamilat* of the village were as such co-sharers entitled to take joint possession of it, were asked by the plaintiffs to give up the area in excess of their shares, and when they refused to do so, thus setting up adverse possession in their own exclusive right as alleged heirs of Kahan Singh, deceased. Upon this view of the case, it is clear that both the suits are within time, and we have no hesitation in overruling the plea of limitation.

On the merits, it is conceded on both sides that the decision of each appeal turns upon the true construction of the word "family" as used in the *sanad* of 19th April 1862, the operative part of which runs as follows :—

"Land granted in rent-free tenure for his (grantee's) life only, on the condition that he shall be bound to render military service when called upon; but the proprietary right to remain in the family of the grantee on his demise subject to assessment."

It is admitted that the land which was granted to Kahan Singh under this *sanad* was part of the *shamilat* of the village of Teona, and that after some negotiations Government took it from the proprietary body without paying any compensation therefor and bestowed it on Kahan Singh, subject to the conditions specified above. It is further conceded that the land has always been entered in the revenue papers as part of the *shamilat*, the name of Kahan Singh and, after his death, that of his widow having been shown only in the column of cultivation. It may, therefore, be legitimately presumed, and this is not disputed by the respondents' pleader, that at the time of making the grant the intention of Government was that when Kahan Singh's "family" become extinct, the land would revert to the proprietors of Teona as owners of the *shamilat* out of which the grant was made. The crucial point in the case, therefore, is whether the defendants-respondents can, under the circumstances, be said to belong to the "family" of Kahan Singh. It is not denied that Kahan Singh's father had died before the grant in question, and it is not proved that in 1862 he and his brothers, Wir Singh and Mahtab Singh, constituted one joint family living under the same roof. The two above-mentioned brothers are not alleged to have had any hand in the cultivation of the land either in Kahan Singh's lifetime or after his death, when his widow Mussammat Mahtabo was in possession. Nor is it shown that the



present defendants, the nephews and grandnephews of Kahan Singh, were ever treated by him as members of his own family so as to be associated with him in residence, food or cultivation. Under these circumstances, we think that regard being had to the fact that the grant in question was made by Government to Kahan Singh in consideration of his personal services as a military man, the word "family" as used in the *sanad* of 1862, must be taken to be employed in its restricted sense, *i. e.*, as meaning "the wife and children" of the grantee, and not in the more extended sense of a household comprising all the blood relations of the man. The respondents' pleader himself saw the difficulty involved in the liberal construction put upon the word by the Divisional Judge, as according to that construction the collaterals of Kahan Singh related to him in the 10th, 15th or even the 20th degree from the common ancestor would be included in the word "family" and would be entitled to take the land in dispute in preference to the owners of the *shamilat*, to whom the land originally belonged and in whose name it has all along continued to be shown in the settlement papers.

The word "family" has various meanings; and it has to be construed with reference to the contest in each particular case (see Stroud's Judicial Dictionary, Volume II, p. 694). In an English will case—*Pigg v. Clarke* (1) Jessel, M. R. held, that the primary meaning of the word "family" was "children," and we agree with him in that view. This word must, we think, be construed, in a document of the kind we are considering, in its primary sense, unless the context, read in the light of attendant circumstances, points to a different intention.

For the foregoing reasons, we hold that the defendants-respondents who are the nephews and grandnephews of Kahan Singh, the original grantee, do not fall within the definition of the word "family" as used in the *sanad* of 1862, and that therefore they are not entitled to hold the land in dispute under the terms of that document. The "family" of Kahan Singh being extinct, the land reverts to the proprietary body of village Teona, and the plaintiffs in each suit are entitled to recover possession thereof to the extent of their shares.

We accordingly accept both the appeals, and reversing the decrees of the Lower Appellate Court, restore those of the Court of first instance with costs throughout.

*Appeal accepted.*

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(1) *L. R. 3 Ch. Dn. 672.*

## No. 21.

*Before Hon. Sir Arthur Reid, Kt, Chief Judge,  
and Hon. Mr. Justice Robertson.*

ISMAIL,—(PLAINTIFF),—APPELLANT,

*Versus*

ISMAIL AND DOST MUHAMMAD,—(DEPENDANTS),—  
RESPONDENTS.

Civil Appeal No. 1105 of 1908.

*Custom—Alienation—Pathans of Gurdaspur tahsil—Gift to daughter's son  
in presence of near collaterals—Different customs in riwaj-i-ams of different  
settlements.*

*Held*, that a sonless Pathan proprietor of the Gurdaspur tahsil has  
by custom power to make a gift of ancestral land in favour of his  
daughter's son in presence of near collaterals.

*Further appeal from the decree of W. A. Le Rossignol, Esquire,  
Divisional Judge, Amritsar Division, dated the 26th February  
1908.*

Gokal Chand, for respondents.

The judgment of the Court was delivered by—

27th Nov. 1909.

SIR ARTHUR REID, C. J.—This is an appeal under  
section 70 (1) (b) of the Courts Act, and the sole  
question for consideration is whether the gift by Kima of  
agricultural land and a house to his daughter's son, Dost  
Muhammad, is valid, in spite of the existence of his near  
collaterals. Kima is sonless and is a Pathan, resident in the  
Gurdaspur district and tahsil. The Courts below have con-  
curred in answering the question in the affirmative, following  
the *Riwaj-i-am* of 1865, in preference to the Customary Law  
compiled by the officer in charge of the subsequent settle-  
ment. The *riwaj-i-am* of the tahsil allows the transfer and  
is corroborated by other evidence detailed by the lower Appel-  
late Court.

We concur with the Court below in holding that the  
transfer is in accordance with the custom which governs the  
family of the donor, and we dismiss the appeal with costs.

*Appeal dismissed.*

## No. 22.

*Before Hon. Mr. Justice Rattigan and Hon.  
Mr. Justice Shah Din.*

DULA SINGH,—(PLAINTIFF),—APPELLANT,

*Versus*

DIAL SINGH AND OTHERS,—(DEFENDANTS),—  
RESPONDENTS.

Civil Appeal No. 226 of 1909.

*Mortgage by conditional sale—Remedy of mortgagee since passing of Punjab  
Alienation of Land Act, XIII of 1900, vide section 9 (2).*

Under the terms of a mortgaged deed, by way of conditional sale, the sole remedy of the mortgagee for the enforcement of his right thereunder was to foreclose under Regulation XVII of 1806. Default having taken place, the mortgagee took proceedings under the Regulation, but infructuously, in 1897 and did nothing further till 1907, when he applied to the Deputy Commissioner for relief under section 9 (2) of the Punjab Alienation of Land Act, XIII of 1900. The Deputy Commissioner thereon offered him a farm of the mortgaged land for eight years which the mortgagee refused, and then brought a suit for a money-decree against the mortgaged land or the mortgagor personally—

*Held*, that the mortgagee was not entitled in law to a money-decree, inasmuch as the effect of the Punjab Alienation of Land Act was, that the particular remedy given to the mortgagee under the terms of his contract has been extinguished, and another remedy substituted in lieu thereof, and that this relief was in the circumstances the only one open to the mortgagee.

*Held* also, that the Civil Courts had no jurisdiction to deal with the terms offered to the mortgagee by the Deputy Commissioner.

*Further appeal from the decree of W. D. M. Malan, Esquire,  
Additional Divisional Judge, Sialkot Division, dated the  
17th December 1908.*

Sheo Narain, for appellant.

Bhagwan Das, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—On the 10th February 1891 a mortgage by way of conditional sale was executed in favour of plaintiff, and it is admitted by Mr. Sheo Narain, his learned pleader, that under the terms of that deed the sole remedy, given to plaintiff for the enforcement of his rights thereunder, was to proceed, in case of default, under the provisions of Regulation XVII of 1806. Default seems to have taken place and plaintiff took proceedings 30th Nov. 1909.



under the Regulation, but infructuously, in the year 1897. Apparently nothing further was done by plaintiff to enforce his rights under the mortgage, and after the enactment of the Punjab Alienation of Land Act, 1900, he found himself placed in rather a difficult position. His sole remedy under the terms of the mortgage-deed was gone, inasmuch as the conditional sale clause was, by the provisions of that Act, rendered null and void. Seeing his difficulty, the plaintiff applied in 1907 to the Deputy Commissioner for relief, under section 9 (2) of the Act, and himself requested that the said clause should be excised from the mortgage-deed. This was done, and the Deputy Commissioner by order dated 20th January 1908, offered him a farm of the mortgaged lands for a period of eight years. He refused this offer and thereafter brought a suit, in which he claimed three alternative reliefs, viz. (1) possession as owner of the lands; (2) possession thereof as mortgagee; or (3) a money decree for Rs. 2,500 against the mortgaged lands or the person of the mortgagor. His claim has been thrown out by the Courts below, and he has now preferred a further appeal to this Court. At the hearing before us Mr. Sheo Narain quite frankly and rightly admitted that plaintiff could not possibly claim either the first or the second of the reliefs above mentioned, and further that he was at best entitled merely to a money-decree for Rs. 2,100, this being the amount which, in the learned pleader's opinion, could at most be asked for. The sole question, therefore, which we have to decide, is whether plaintiff is in law entitled to a money decree, pure and simple, for that amount.

In our opinion, there can be no doubt that he is not. It is conceded that, under the terms of the mortgage the sole remedy given to the plaintiff was to enforce his security by means of the conditional sale clause. This remedy was extinguished upon the enactment of the Punjab Alienation of Land Act.

This is also admitted, but Mr. Sheo Narain contends, that once that remedy was taken away, plaintiff was entitled to fall back upon the mortgagor's promise to pay the debt with interest and compound interest. The learned pleader accepts in its entirety the ruling of their Lordships of the Privy Council in *Kalka Singh v. Paras Ram* <sup>(1)</sup>, but he contends that that ruling ceases

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(1) (1895) I. L. R. 22 Cal. 434.

to operate in a case in which the sole remedy given by the contract between the parties is put an end to by the intervention of the legislature. In such a case, he argues, that the Courts should imply a covenant by the mortgagor to be personally liable for the debt, and in support of this contention he refers to section 65 of the Indian Contract Act and to section 68 of the Transfer of Property Act, 1882. We cannot see how these provisions help his client. There might have been force in the argument, had not the legislature made special provision for cases of this kind. An unfortunate mortgagee might then have very reasonably relied upon the last paragraph of section 68 of the Transfer of Property Act as embodying a sound and equitable principle of ordinary justice. But the legislature has in express terms provided that in cases of this kind a mortgagee who is deprived of the security given to him under the terms of his contract, shall be entitled to another security in lieu thereof, and has enacted that he can, in such circumstances, obtain a farm of the mortgaged premises upon such terms as the Deputy Commissioner may, within the provisions of the law, see fit to grant him (section 9 (2) of the said Act). A particular mortgagee may consider that the form offered to him is not an adequate remedy, but that is a matter with which the civil courts have no authority to deal. In the present case it was plaintiff himself who applied to the Deputy Commissioner for relief, and it is not contended that he has been entirely deprived of relief. On the contrary, it is admitted that a farm of the land for eight years was offered him, and the only grievance under which plaintiff labours is, that in his opinion this remedy or relief was insufficient. But with this aspect of the case we obviously have no concern.

As matters stand, we are of opinion, that the effect of legislation in such matters is, that the particular remedy given to the mortgagee under the terms of his contract has been extinguished and another remedy substituted in lieu thereof. The latter remedy is specific, and the principle laid down by their Lordships in the Calcutta case above cited, appears to us to apply as much to it as to other cases. Section 65 of the Contract Act is clearly inapplicable, for it cannot possibly be contended that the mortgage contract has become void, because the legislature has thought fit to intervene and to substitute another remedy for the remedy provided for in the mortgage deed. The mortgage still subsists, and it is because it does subsist that the Deputy Commissioner is empowered to grant relief

to the mortgagee when conditional sale clause is no longer of any use to him.

Nor again can this case by any stretch of language be brought within the four corners of section 68 of the Transfer of Property Act, and after carefully reading through the provisions of that section, Mr. Sheo Narain was forced to admit that the present case could not fall within any of the clauses of that section, except possibly the last paragraph. But even that provision does not help him, inasmuch as the Deputy Commissioner, acting (as he is empowered to act) on behalf of the mortgagor, has offered the plaintiff a security which in that officer's opinion is "a sufficient security" for the debt. We cannot see, in the circumstances, how it is possible for the Courts to accept the doctrine, that in cases of this kind, when the sole remedy provided in the contract is extinguished, owing to the fact that by legislative enactment conditional sale clauses are no longer enforceable, it is open to the Courts to hold that they are at liberty to infer a personal covenant to pay the debt on the part of the mortgagor. The particular and special remedy given in the mortgage-deed may no longer exist, but there is, in substitution thereof, another special remedy—that is the remedy given by section 9 (2) of the Punjab Alienation of Land Act,—and if in any case a mortgagee has no other enforceable remedy open to him, he must accept the legislative remedy. Of course it may happen that, even after the conditional sale clause is eliminated, the mortgagee has by express agreement between the parties another remedy on the contract which is in no way impinged upon by the provisions of that Act. If he has, he can of course enforce it. But that is an entirely different matter.

In the case before us the contract made no provisions for any such other remedy, and for the reasons given, we cannot accept the argument that we are bound, either by law or equity, to infer a liability upon the mortgagor which is not imposed upon him under the terms of his contract or by legislative enactment. In this connection we might refer, by way of analogy, to the decision of the Madras High Court in *Arumugam v. Sivagnana* (1). The lower Courts were right in dismissing plaintiff's suit and we reject the appeal with costs.

*Appeal rejected.*

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(1) (1890) I, L, R. 13 Mad. 321.



## No. 23.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge,  
and Hon. Mr. Justice Johnstone.*

RAM KISHEN,—APPELLANT,

*Versus*

BELI RAM,—RESPONDENT.

Civil Appeal No. 1091 of 1908.

*Minor and guardian—Appointment of guardian of person of a minor—  
joint Hindu family—jointness—separation.*

*Held*, following *Gharibullah v. Khalak Singh* <sup>(1)</sup> that the fact, that a Hindu minor and his uncle are joint in property as members of a joint Hindu family, does not bar the appointment of a third person as guardian of the minor's person, but does bar the appointment of such person as guardian of the minor's property.

*Held* also, that the fact that a Hindu minor is under the care of a person not interested as an heir does not of itself terminate the relations of the minor and his uncle *inter se* as members of a joint Hindu family—and that a suit by the uncle against the minor, to establish the fact that a mortgage transaction effected by the minor's father was on behalf of the joint family, does not effect a separation.

*Held* further, that there is no inconsistency in a guardian of the minor's person being appointed without any appointment of a guardian of the joint property, of which he is a coparcener :—

*Appeal from the order of J. A. Ross, Esquire, District Judge,  
Sialkot, dated the 30th July 1908.*

Gobind Das, for appellant.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The questions for consideration 18th Dec. 1909.  
are whether the minor and the respondent—Beli Ram—are joint in property as members of a joint Hindu family, and whether this fact, if established, precludes the appointment of a guardian of the minor's property.

The parties are admittedly governed by Hindu law, and the District Judge has recorded in his judgment that it was admitted that the property of the minor was "owned jointly" by the respondent, and no attempt was made to deny the respondent's allegation, that he and the minor's father lived together until the father's death as members of a joint Hindu family. The pleader for the appellant attempted to contend

(1) (1903) I. L. R. 25 All. 407.

that the property of the minor and respondent was not joint, but we cannot allow litigants to resile in this Court from admissions of fact, made by them below, and to set up cases which emanate from their pleader's brains and are based on facts not alleged below.

The fact that the minor is under the care of a person not interested as an heir in his death, does not of itself terminate the relations of the minor and the respondent *inter se* as members of a joint family, and the only instance cited for the appellant of a course of conduct, opposed to the existence of jointness, is a suit by the respondent against the minor for possession of half of some property mortgaged to Hari Singh, father of the minor. It is a fact, that individual members of a joint Hindu family frequently hold property in which the other members of the family have no share, and a suit by one against another based on the allegation that an acquisition was for the joint family and not merely for the member in whose name it was recorded does not effect separation. The facts in *Bishen Singh v. Kishen Chand* <sup>(1)</sup>, cited for the appellant, differ very materially from those of this case, the plaintiff therein having claimed as eldest son the whole of his father's estate, his younger brothers being defendants.

The judgment followed the rule laid down by their Lordships of the Privy Council in *Joy Narain Giri v. Girish Chunder Myte* <sup>(2)</sup>, that if it appears that the plaintiff, a member of a joint Hindu family, intended by his suit to obtain the share to which he would be entitled on partition and the decree passed in the suit assigns him that share, such decree does in fact effect a partition, at all events of rights, which is effectual to destroy the joint estate.

Here again the facts differed clearly from those of the present case. The plaintiff alleged that the defendant had expelled him from the joint estate and refused to allow him any participation of the joint estate, and sued for recovery of possession of his eight annas share of all the joint properties, both real and personal, with mesne profits and interest from the date of disposssession.

The intention of the respondent in suing the minor was, in our opinion, to establish the fact that the mortgage transaction by Hira Lal was on behalf of the joint family of which he and

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<sup>(1)</sup> 9 P. R. 1899.

<sup>(2)</sup> (1879) I. L. R. 4 Cal. 434.

Hira Lal were members, and was not effected with money belonging to Hira Lal only. That suit consequently did not, in our opinion, destroy the joint estate or indicate any intention to effect partition, and the only proprietary interest of the minor in the property, other than that separately acquired by his father, is as coparcener with the respondent in joint family property. The first question above stated must, therefore, be decided in the affirmative and the second, following the judgment of their Lordships of the Privy Council in *Gharib Ullah v. Khalak Singh* (1), also in the affirmative.

As ruled by Jenkins, in *Binlaji v. Mathurabai* (2), the status of the minor places no difficulty in the way of appointing a guardian of the person, but different considerations apply to the guardianship of property. There is, therefore, no inconsistency in a guardian of the minor's person being appointed without any appointment of guardian of the joint property of which he is a coparcener. The appeal fails and is dismissed with costs.

*Appeal dismissed.*

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No. 24.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and  
Hon. Mr. Justice Robertson.*

SHEIKH FAZAL ILAHI AND OTHERS,—(PLAINTIFFS),—  
APPELLANTS,

*Versus*

THE SECRETARY OF STATE FOR INDIA IN COUNCIL,—  
(DEFENDANT),—RESPONDENT.

Civil Appeal No. 434 of 1908.

*Cantonments Act, XIII of 1889, section 4 (2)—power of Government to define the limits of any cantonment so as to extend them—General Clauses Act, X of 1897, section 14.*

*Held*, that looking at the Act as a whole, the word "define" in section 4 (2) of the Cantonments Act, 1889 must be construed to mean, define by way of extension as well as by way of retrenchment, and that under section 14 of the General Clauses Act, 1897, such power can be exercised from time to time.

*Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Rawalpindi Division, dated the 3rd January 1908.*

Grey and Oertel, for appellants.

Government Advocate, for respondent.

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(1) (1903) I. L. R. 25 All. 407.

(2) (1906) I. L. R. 30 Bom. 152.



13th Dec. 1909.

The judgment of the Court was delivered by—

ROBERTSON, J.—The facts of this case are fully set forth in the judgments of the lower Courts, but we think it best very briefly to set them forth here.

The plaintiff Fazal Ilahi owned some land on the Peshawar road—just outside the Rawalpindi Cantonment. He commenced to build on that land. Notice was sent to him by the Cantonment authorities to desist. This of course was *ultra vires*, a fact eventually recognized. It was then determined to bring the area in question within the limits of the Rawalpindi Cantonment. It is urged now, that the plaintiff never consented to his land being brought within the Cantonment; it is contended however, *inter alia*, that his consent was not necessary, that, as we are informed, this consent is stated in a letter, dated 11th July 1900, from the Cantonment Magistrate to superior authority; this consent is set forth, in the letter, dated 11th September, from the Government of India, which sanctions the inclusion of this land in the Cantonment, and it is said that the owners are understood to have agreed to the inclusion of this land in the Cantonment without compensation. It is strenuously urged here, that no such consent was ever given, and there is nothing to show that it was. It is urged further that the absence of this consent, which was made a condition precedent by the Government of India in their letter of the 11th September 1900 to the Government of the Punjab, not having been given, the action of the Punjab Government in including the land in question in the Rawalpindi Cantonment and issuing the Notification No. 61, dated 12th February 1901, was *ultra vires*.

We will deal with this point at once. We think that the letter from the Government of India, dated 11th September 1900, in the Military Department, was an authorization to the Punjab Government, under section 4 of the Cantonments Act, to include the area in question within the Cantonment. We do not propose to follow Mr. Grey as to his criticism of the language of this letter, or into the question whether or not it was based on incorrect information as to consent or other matters. If there is any such ground of complaint, it could be made the subject of a prayer to the proper authority. The Punjab Government acted under the orders of the Government of India in the matter, as provided by law in section 4 and with the motives or information, which induced these authorities to act as they did, we are not concerned. As far as this part of the question is concerned, their action cannot be said to have been *ultra vires*, and the Courts would have no ground upon which to interfere.

We now come to a larger question which, we are told, is one of considerable importance, and it is this :—

Section 4 of the Cantonments Act runs as follows :—

“(1) The Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the official Gazette, declare any place in which any of Her Majesty’s regular forces are quartered within the territories administered by such Government to be a Cantonment for the purposes of this Act and of all other enactments for the time being in force, and may withdraw any such declaration.

“(2) The Local Government, with the like sanction, may, also by a like notification, define the limits of any cantonment for the like purposes.”

Can it be said that that section justifies and renders legal the extension of a Cantonment which has already been once defined as to its limits so as to include new land, not already within the defined limits?

Section 4 gives the power (1) to declare any “place” on which any of His Majesty’s regular forces are quartered to be a Cantonment.—(2) to define the limits of any Cantonment section 2 provides that “all limits defined as the local limits of a Cantonment with the approval of the Governor-General or Local Government before the passing of this Act shall be deemed to have been (respectively made, given, imposed and published and) defined under this Act.”

The force of the word “any” in section 4 (2) appears to us therefore to be clear. Any new Cantonment notified under section 4 or any old Cantonment not already “defined” could be “defined” by the Local Government under section 4 (2). Mr. Grey contends with great force that “to define” means to define once for all, subject to revision possibly of mistakes in the original definition, which revision might be covered by section 14 of the General Clauses Act, but contends that “define” cannot by any stretch of language be held to mean also “extend” or “include.” He points out that under the Municipal Act definite powers of extension are specifically conferred, and that there is a careful procedure, and definite restriction laid down as to the manner in which such extension shall be carried out as provided in sections 4, 194 and 195 of the Municipal Act. If, he argues, extension by summary process were intended, it would have been definitely stated. He also pointed out that the case of houses

and undesirable tenements cropping up on the limits of Cantonments is fully provided for by section 28 of the Cantonments Act, which practically enables the authorities, to put in force as regards such area all the powers of control possessed over Cantonment areas, except the provisions of the House Accommodation Act, which is the crux of the whole matter.

It was further pointed out that section 10 of the House Accommodation Act clearly contemplates, that, when an extension has been made of any Cantonment, it must be by way of *acquisition* of land—section 10 (2) provides that before certain action can be taken in regard to certain matter, a report must be made as to whether or not such action will “necessitate the acquisition of land at some future time for the *extension of the Cantonment*.”

This is the only definite provision brought to our notice in the Cantonment or House Accommodation Act regarding the extension of a Cantonment, and it contemplates such extension, not by arbitrary alteration of pre-existing boundaries under the power given to define such boundaries, but by the acquisition of land.

For the respondent the learned Government Advocate, whose contention in regard to the assent of the Government of India having been given we have accepted, urged that the words “define” in section 4 (2) covered the words “include” or “extend.” The meaning of “define” in Webster’s Dictionary was quoted to us but did not seem to us to assist the contention. The force of the word “any” in section 4 (2) we have already discussed.

We have considered the matter very carefully. The question whether the power to “define” given by section 4 (2) of the Cantonments Act includes the power to extend under that section the limits of a Cantonment by the inclusion of areas clearly outside the limits already defined is not an easy one.

Many of the arguments put forward by Mr. Grey must be admitted to have great force. As regards the extension of municipal limits, however, we think that that matter stands on different ground and must be looked upon from a different standpoint from the question of extending a Cantonment, as it is quite clear that the Legislature deliberately intended to give much more extensive and summary powers, as we should naturally expect, in the one case than in the other. We are not, there-



fore, pressed by the argument put forward, regarding the restricted power of municipalities, and we find that under the provisions of section 4 (1) this area could certainly have been notified as a Cantonment. Under that clause it is quite clear that any reasonable area in the vicinity of which troops are quartered can be gazetted as a Cantonment. It could not possibly be contended that, for instance, if the number of troops quartered within limits, already defined as a Cantonment, were largely increased so as to require a greater area for their accommodation, adjacent land could not be gazetted under section 4 (1), even though the new barracks were actually built within the old area. Seeing, therefore, that the same result could certainly have been attained by a notification under the first clause of section 4, we think it would be difficult to hold that it could not be done under section 4 (2). The word "define" taken by itself may not in ordinary parlance cover "include" and "extend," but looking at the Act as a whole, and section 4 in particular as a whole, we think the section must be interpreted to give the power taken with section 14 of the General Clauses Act, to "define" from time to time, and such power infers the power to "define" by way of extension, as well as by way of retrenchment. If the intention of the legislature were not clear from the rest of the Act, there would be more force in regard to the arguments put forward in regard to section 4 alone; but we do not think it is the correct method of interpretation for the Courts to put a hypercritical construction upon certain expressions in an Act, where the meaning is clearly indicated by the context and the Act as a whole.

While therefore admitting that the question is not free from difficulty, we hold that the action taken in including the area in question in the Rawalpindi Cantonment cannot be held to be *ultra vires*. The appeal therefore fails and dismissed with costs.

*Appeal dismissed.*

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## No. 25.

Before Hon. Sir Arthur Reid, Kt., Chief Judge  
and Hon. Mr. Justice Johnstone.

MUHAMMAD AND OTHERS—(DEFENDANTS)—APPELLANTS,

*Versus*

LAKHAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1262 of 1908.

*Custom—Alienation—Will in favour of daughter and son-in-law—Khanadamad—Gujars of Gujrat District.*

*Held*, that among *Gujars* of the Gujrat District wills in favour of daughters and their husbands are valid only, if the latter is a duly appointed and regularly and continuously recognised "*khanadamad*".

*Further appeal from the decree of Khan Bahadur Moulvi Inam Ali, Divisional Judge, Jhelam Division, dated the 24th August 1908.*

Devi Dial, for respondent.

The judgment of the Court was delivered by—

17th Dec. 1909.

SIR ARTHUR REID, C. J.—The evidence on the record does not justify our differing from the concurrent findings of the Courts below that the appellant Muhammad was not *khanadamad* of Makhan, deceased father of his wife Musammatt Jiواني.

*Bholi v. Fakir* <sup>(1)</sup>, cited in the admitting order, dealt with *Gujars* of the Gujar Khan *tahsil* of the Rawalpindi District, and the parties to this appeal are *Gujars* of Gujrat.

The "customary law" of the Gujrat District, compiled at the settlement of 1892 supports at page 8, paragraph 16 the admission, recorded by the lower Court, "that among *Gujars* "such like wills are valid only if made in favour of duly appointed and regularly and continuously recognised *khanadamad*," and no instance opposed to the rule laid down in the "customary law" has been cited. The appeal, therefore, fails and is dismissed with costs.

*Appeal dismissed.*

<sup>(1)</sup> 62. P. R. 1906.

## No. 26.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

RADHA RAM AND OTHERS—(DEFENDANTS)—APPELLANTS,

*Versus*

ANOKH SINGH AND OTHERS—(PLAINTIFFS)—  
RESPONDENTS.

Civil Appeal No. 1319 of 1907.

*Village—when it becomes a town—mouza Rori, tahsil Sirsa, district Hissar.*

*Held*, that the village Rori, which is not a municipality but has a population of about 3,300 and comprises about 600 houses, is not a town, in spite of the facts that 40 or 50 of the houses are *pakka* and that 10 or 12 of the inhabitants pay income-tax.

*Further appeal from the decree of C. H. Atkins, Esquire, Divisional Judge, Ferozepore Division, dated the 11th April 1907.*

Duni Chand, for appellants.

Ganpat Rai, for respondents.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The finding of the lower Appel- 10th Jany. 1910.  
late Court is that Rori is a village, and I see no reason for holding that this finding is erroneous. Rori has not been prescribed as a town in the last gazetteer ; it is not and was not at the date of sale a municipality ; the area of agricultural land is about 11,500 acres for a population all told of about 3,300 ; the number of houses is about 600 and the area of agricultural land per house is about 20 acres.

The facts that 40 or 50 of the houses are *pakka* and that 10 or 12 of the inhabitants pay income-tax, do not of themselves justify the conclusion that Rori is a town, and the other facts stated above indicate that it is a village.

For these reasons no cause for interference under section 70, (1) (b) with the finding on remand has been established, and on that finding the appellant, as remarked in the remand order, has not a leg to stand on.

The appeal is dismissed.

*Appeal dismissed.*



## No. 27.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

RAM CHAND—(DEFENDANT)—PETITIONER,

Versus

RAM SUKH DAS—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 2337 of 1907.

*Valuation of suit for possession of immovable property against tenant—Suits Valuation Act, VII of 1887, section 8—Court Fees Act, VII of 1870, section 7 XI (c, c).*

*Held*, that under section 7, XI (c, c) of the Court Fees Act, VII of 1870 (as amended by Act VI of 1905) the value for purposes of Court fees of a suit for possession of immovable property by a landlord against his tenant is a year's rent, and following *Sohan Lal v. Gulab Mal* <sup>(1)</sup> the value of the suit for purposes of jurisdiction is the same.

*Application under section 70 (b) of Act XVIII of 1881 as amended by Act XXV of 1899, for revision of the decree of C. H. Atkins, Esquire, Divisional Judge, Ferozepore Division, dated the 8th June 1907.*

Broadway, for petitioner.

Shadi Lal, for respondent.

The judgment of the learned Judge was as follows :—

10th Jan. 1910.

SIR ARTHUR REID, C. J.—I see no reason for interference. The Courts below have found that the petitioner's possession was as tenant, and *Parsick v. Parsick* <sup>(2)</sup> cited for him, does not help him.

Since the judgments in *Sohan Lal v. Gulab Mal* <sup>(1)</sup> and *Ram Raj Tewari v. Girnandan Bhagat* <sup>(3)</sup> were delivered, the Court Fees Act has been amended by the enactment of section 7 XI (c, c), which values suits for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy, according to the amount of the rent payable for the year next before the date of presenting the plaint. On the findings of the Courts below it is immaterial that the petitioner denied the existence of the relation of landlord and tenant, pleaded that he was owner of the property in suit and set up adverse possession. These pleas were found to be groundless, and it was found that the petitioner was a tenant who had

<sup>(1)</sup> 50 P. R. 1896.

<sup>(2)</sup> 72 P. R. 1899.

<sup>(3)</sup> (1898) I. L. R. 15 All. 63.

held over. Section 7, (XI) of the Court Fees Act is not one of the sections or sub-sections excluded by section 8 of the Suits Valuation Act from the rule, that the value as determinable for the computation of Court fees and the value for purposes of jurisdiction shall be the same, and I have no hesitation in following *Sohan Lal v. Gulab Mal* <sup>(1)</sup>, and holding that the value, as against the petitioner, is the rent for the year next before suit. This rent has been fixed at one rupee *per mensem*, and is in any case well within the jurisdiction of a *Munsif* of the first class.

The first ground, on which notice was issued, therefore fails, and the other ground, that the petitioner's witnesses for whom process fees were paid were not examined, was apparently advisedly not pressed in the Lower Appellate Court. The record indicates that many adjournments were granted between the 31st October and the 26th February to enable the petitioner to produce his witnesses, and that he was responsible for their not being examined.

The application is dismissed with costs.

*Revision rejected.*

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No. 28.

*Before Hon. Mr. Justice Robertson.*

MUSSAMMAT JIWANI AND OTHERS—(DEFENDANTS)—  
APPELLANTS,

*Versus*

NATHU MAL AND OTHERS—(PLAIN-) }  
TULSI DAS—(DEFENDANT), } —RESPONDENTS.

Civil Appeal No. 706 of 1909.

*Civil Procedure Code, 1882, section 280—Adjudication on merits—Limitation—Indian Limitation Act, XV of 1877, article 11.*

N. M. in execution of his decree against T. D. attached the house in dispute on 20th June 1902. Mussammat J. and L. objected to attachment, an enquiry was made by the executing Court, and on 14th October 1903 in the absence of the decree-holder an *ex parte* order releasing the house was passed in the following words: " *Aj digridar hazer nahin hai, misl ijtira ba*

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<sup>(1)</sup> 50 P. R. 1896.

"*adam pairvi dakhil daftar hui hai, lihaza jaidad makruka waguzar howe, "misl dakhil daftar ho."* The decree-holder again attached the house in the same decree on 4th June 1907, and the District Judge released the house on the ground that having once been released it could not be attached again. Thereupon the decree-holder, on 29th August 1908 brought the present suit. The First Court, holding the suit time-barred, dismissed it, and the Divisional Judge remanded the case for decision on the merits, being of opinion, that the order of 14th October 1903 was not one under section 280 of the Civil Procedure Code, 1882, inasmuch as it was *ex parte* and there being no adjudication on the merits. On appeal to the Chief Court—

*Held*, that notwithstanding the wording of the order, dated 14th October 1903, it was an adjudication on the merits under section 280, Civil Procedure Code, 1882, inasmuch as the objector had actually produced his evidence, and the decree-holder after several hearings produced none and absented himself on the last hearing, and that consequently the suit was barred under article 11, schedule II of the Indian Limitation Act, 1877.

*Miscellaneous appeal from the order of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 15th March 1909.*

Govind Das, for appellants.

Nanak Chand, for respondents.

The judgment of the learned Judge was as follows :—

21st Dec. 1909.

ROBERTSON, J.—I think it must be held in this case that the order of 14th October 1903 was an adjudication on the merits after an investigation under section 280, Civil Procedure Code. None of the rulings quoted are exactly in point; that in *Rahim Bux v. Abdul Kadir* <sup>(1)</sup> comes nearest.

In this case the objector had put in an objection and had actually produced his witnesses. Several adjournments were made to enable the decree-holder to produce his evidence, then there was an adjournment to allow of proceedings elsewhere being concluded, and finally the case was decided *ex parte* in the absence of the decree-holder, but after he had had several opportunities of producing his evidence, and the objector had completed his. The objector is not to be denied the benefits of an adjudication under section 280, because the decree-holder chose to absent himself and never produced his evidence. *Sajan Ram v. Ram Rattan* <sup>(2)</sup> is not in conflict with this view. In that case the objector had produced no evidence, and did not appear, letting his objection slide. He was, there-

<sup>(1)</sup> (1905) I. L. R. 32 Cal. 537.

<sup>(2)</sup> 87 P. R. 1904.



fore, very much in the same position as if he had never made any. Here he persevered with it and produced all his evidence; and the decree-holder, after several hearings, produced none and did not appear. I have consulted all the rulings quoted\* and come to the decision that the order of 14th October 1903 was an order under section 280, Civil Procedure Code. There was an investigation; and though the wording of the order does not discuss the merits, it must be held, inasmuch as the decision is in favour of the objection, that the Court decided that the claim of the objector was proved, at least in the absence of the opposite party and any rebutting evidence. This would amount to an investigation and decision on the merits within the meaning of the *dicta* of their Lordships of the Privy Council in *Sardhari Lal v. Ambika Pershad* <sup>(9)</sup>.

This suit is consequently time-barred. I accept the appeal and dismiss the suit with costs throughout—judgment announced.

*Appeal accepted.*

### No. 29.

*Before Hon. Mr. Justice Johnstone.*

SHAHZADA SURAYA JAH—(PLAINTIFF)—PETITIONER,

*Versus*

AZIM AND OTHERS —(DEFENDANTS)—RESPONDENTS.

Civil Revision No. 548 of 1909.

*Absentee—Joint holding—Abandonment—Adverse possession—Indian Limitation Act, XV of 1877, section 28, articles 142 and 144—Propositions applicable in such cases.*

Plaintiff sued to recover certain shares in a joint holding from defendants, who had been absent and whose ancestors had been absent from the village for a very long period, alleging that defendants had returned lately and taken possession of the shares, the right to which had lapsed through long dispossession.

*Held*, that in such a case the circumstances and especially the long silence and inaction of defendants and their ancestors, are evidence of abandonment, and therefore the possession of defendants and their ancestors ceased when they left the village and ceased to take a share of the profits

\* *Rahim Bux v. Abdul Kadir* <sup>(1)</sup>  
*Maghar Mal v. Jot Ram* <sup>(2)</sup>, *Sojan Ram v. Ram Rattan* <sup>(3)</sup>,  
*Coatas v. Kashi Ram* <sup>(4)</sup>, *Karsan v. Ganpat Ram* <sup>(5)</sup>,  
*Lachmi Naraen v. H.C. Martindell* <sup>(6)</sup>,  
*Gayadin v. Mus-sammat Baij Nathi* <sup>(7)</sup>, *Chiman Lal Balabhai v. N. C. Macleod* <sup>(8)</sup>

<sup>(1)</sup> (1905) *I. L. R.* 32 *Cal.* 537.

<sup>(2)</sup> 90 *P. R.* 1902.

<sup>(3)</sup> 87 *P. R.* 1904.

<sup>(4)</sup> 76 *P. R.* 1903.

<sup>(5)</sup> (1898) *I. L. R.* 22 *Bom.* 875.

<sup>(6)</sup> (1897) *I. L. R.* 19 *Al.* 253, *F. B.*

<sup>(7)</sup> (1908) 11 *O. C.* 180.

<sup>(8)</sup> (1906) 8 *Bom. L. R.* 794.

<sup>(9)</sup> (1888) 15 *Cal.* 521.

and so forth. Hence, inasmuch as limitation began to run against defendants more than 12 years before suit, their rights are under article 142 of the Indian Limitation Act extinct, and plaintiff's claim must be decreed.

[ The judgment also lays down certain propositions applicable in such cases. ]

*Application under section 70 (a) and (b) of Act XVIII of 1884 for revision of the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 15th August 1908.*

Nanak Chand, for petitioner.

The judgment of the learned Judge was as follows :—

10th Jan. 1910.

JOHNSTONE, J.—This revision case along with Nos. 416 and 549 and another case, in which notice has not been served on respondents, and which I have postponed to a fresh date, have all been admitted on the same point of limitation. Plaintiff's case was that the defendants, who had been absent and whose ancestors had been absent from the village for a very long period, had returned lately and taken possession of certain shares of the village lands, the right to which had lapsed through long discontinuance of possession. The First Court held that the whole village being one *khata*, in which plaintiff and his ancestors and defendants and their ancestors were joint sharers, the possession of plaintiff during the absence of defendants and their ancestors was not *adverse* possession, and so it dismissed the suit.

The Lower Appellate Court, on appeal by plaintiff, observed that the question was, whether defendants had lost their rights in the disputed land "by abandonment and by the plaintiff's *"adverse possession."* Then the Court remarked that, inasmuch as plaintiff was a co-sharer in this *bil-ij-mal* village, shares in which are in dispute, plaintiff's possession was not adverse unless he manifested an intention to set himself up as sole proprietor; and it went on to point out, with advertence to *Gobind Lall Seal v. Debendro Nath Mullick* <sup>(1)</sup>, that where the occupier's possession is permissive, the owner cannot be said to have discontinued possession or to have been dispossessed. Lastly it laid it down, relying on *Sain Ditta v. Ghulaman* <sup>(2)</sup>, that even if the absentees abandoned the land, they have not lost their rights, unless their rights have been extinguished by the operation of the law of limitation.

<sup>(1)</sup> (1880) I. L. R. 6 Cal. 34.

<sup>(2)</sup> 85 P. R. 1892, F. B.

Here plaintiff's learned counsel refers me to articles 142 and 144, schedule II, Limitation Act, 1877, *Nawab Mahomed Amanulla Khan v. Badan Sing* <sup>(1)</sup>, *Jodha v. Dhani Ram* <sup>(2)</sup>, *Dhan Singh v. Har Narain* <sup>(3)</sup>.

In the first of these rulings, it was laid down—

(a) that, when article 142 applies, it is unnecessary to go into the question of *adverse* possession of the actual occupiers ;

(b) that when at settlement plaintiff's title is recognised, but he, not being in actual possession, refuses to engage for the land-revenue, and so Government makes the settlement with the defendants co-sharers, dispossession or discontinuance of possession takes place on date of refusal so to engage. The idea of course is, that until that refusal the possession of defendants, was possession of plaintiff, their co-sharer. *Sain Ditta v. Ghulaman* <sup>(4)</sup> is a Full Bench case of the Chief Court. Though the learned Judges put the point in different ways, the head-note fairly states their views thus—

“ An owner of land who has abandoned it within 12 years “ previously to the institution by him of a suit for possession “ thereof, does not, by such mere act of abandonment, lose his “ proprietary rights. His title will prevail, provided that it has “ not been extinguished by the operation of the law of limitation.”

In discussing the case *Stogdon, J.* defined abandonment as applied to absentee cases in the Punjab, “ as an intentional quitting of possession by the proprietor, coupled with an intention “ not to resume it.” And he explains that, apart from the law of limitation, an absentee proprietor, who has abandoned his land, cannot be deprived of his title to recover it except by some act of his, which would operate as an estoppel ; and Bullock, J. puts the matter in much the same way.

In *Jodha v. Dhani Ram* <sup>(2)</sup> it was ruled that, where plaintiff's father left the village 30 years before suit, and neither he nor plaintiff made any claim to the land or interested themselves in it for all that time, there was a clear abandonment. This was a single Judge case, and the property was a share in a *khata* in which the other co-sharers were the defendants.

In *Dhan Singh v. Har Narain* <sup>(3)</sup> a Division Bench ruled that an entry in the record of rights providing, that when the

(1) 23 P. R. 1890. P. C.  
(2) 30 P. R. 1901.

(3) 85 P. R. 1909.  
(4) 85 P. R. 1892, F. B.



plaintiffs-absentees (who left their land 20 years previously without making any arrangements for the payment of the revenue) return and want the land, they can take it back, does not constitute a trust, antedating to the original abandonment by the plaintiffs, and that the plaintiffs, having failed to prove that during the last 40 years they have had any connection with the land or shared its profits, the respondents have acquired title by adverse possession. It is not stated whether the property was a share in land in which defendants were also co-sharers or not.

The Calcutta ruling quoted by the Lower Appellate Court seems to me of little use here, but, after a careful consideration of the articles 142 and 144 aforesaid and of the other authorities quoted, I think the following propositions are sound, namely,—

(a) Possession may be either actual or constructive.

(b) While either kind of possession exists in the proprietor, time does not begin to run against him.

(c) Where one co-sharer holds the share of another co-sharer, who had simply ceased to hold *actual* possession, the holder's possession implies *constructive* possession by the proprietor.

(d) Where the absentee has "abandoned" possession in the sense explained by Stogdon, J. in *Sain Ditta v. Ghulaman* (1) it is impossible to talk of the co-sharer's possession of the renouncing person's share as being possession on behalf of the latter. [This is where both the Lower Courts have gone wrong.]

(e) In a case like the present, the circumstances and especially the long silence and inaction of defendants and their ancestors, are evidence of "abandonment"; and therefore the possession of defendants and their ancestors ceased when they left the village and ceased to take a share of the profits and so forth. Hence, inasmuch as limitation began to run against defendants more than 12 years before suit, their rights are under article 142 aforesaid extinct. Had they sued within 12 years of the "abandonment" they would have recovered (*Sain Ditta v. Ghulaman*) (1) notwithstanding the "abandonment", but at the end of 12 years all their rights were lost (section 28, Limitation Act, 1877). I may note here that the defendants

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(1) 85 P. R. 1892, F. B.

present here stoutly denied that either they or their fathers had ever been absentees at all; but the evidence on this point is too strong to be overthrown by mere assertions at this stage.

For these reasons, I must find that plaintiff is entitled to his decree in all three cases, and I accept these revisions and decree all three suits. Considering all the circumstances I think the parties should bear their own costs, and I order accordingly.

*Revision accepted.*

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No. 30.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

SARDUL SINGH AND OTHERS—(DEFENDANTS)—  
APPELLANTS,

*Versus*

KARM SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS,

Civil Appeal No. 1250 of 1907.

*Hindu law—Succession—Tarkhans of Amritsar city—Custom.*

*Held*, that Hindu non-agriculturists residing in a city are, in the absence of proof of a custom by specific instances modifying Hindu law, presumably governed by that law, and that among Hindu *Tarkhans* of the Amritsar city, a grandnephew as a *sapinda* succeeds in preference to a great-grandnephew and to the widow of a *sapinda*, whose husband pre-deceased the widow of the last male owner.

*Further appeal from the decree of Major A. A. Irvine, Divisional Judge, Amritsar Division, dated the 18th March 1907.*

Muhammad Shafi, for appellants.

Shadi Lal, for respondents.

The judgment of the learned Judge was as follows:—

SIR ARTHUR REID, C. J.—The question for consideration is 28th Jan. 1910. whether some of the parties, *Tarkhans* of Amritsar city, are governed by Hindu law only, or whether the effect of that law upon them is modified by custom entitling Sardul Singh, who was not a *sapinda* of the last male owner, or Mussammatt Bhani, widow of a *sapinda* who pre-deceased the widow of the last male owner, to a share in the property in suit.

Counsel for the appellants has cited several cases in which it was ruled that various members of tribes, not ordinarily

governed by agricultural custom, were governed by custom at variance with their personal law, e.g., *Kirpa Ram v. Jawahir Singh* (1), *Ram Ditta v. Bishen* (2), *Maya Das v. Bishen Das* (3), *Abnashi Ram v. Mul Chand* (4), *Nur Muhammad v. Lal* (5), *Pitambar v. Ganesha Ram* (6), *Mehtab-ud-din v. Abdullah* (7).

No authority actually in point has been cited for the appellants and *Daya Ram v. Soheli Singh* (8) does not help them, in the absence of evidence of specific instances modifying Hindu law, which presumably governs Hindu non-agriculturists residing in a city.

The plea that the plaintiff-respondent, Jawahir, admitted that he was governed by custom, has no force. It is based on a notice written for Jawahir by a clerk who apparently thought he knew more law than he actually knew.

I concur with the Courts below in holding that the appellants are not entitled to any part of the property in suit, and I dismiss the appeal with costs.

### No. 31.

*Before Hon. Sir Arthur Reil, Kt., Chief Judge.*

MUHAMMAD HUSSAIN—(PLAINTIFF)—PETITIONER,

*Versus*

MUHAMMAD AND MUSSAMMAT BHOLI—(DEFENDANTS)—  
RESPONDENTS.

Civil Revision No. 510 of 1910.

*Custom—Alienation—Gift to married daughter, whose husband is khandamad, valid as against collaterals—Kahuts, mauza Thirpal, tahsil Chakwal, district Jhelam.*

*Held*, that among Kahuts of mauza Thirpal, tahsil Chakwal, district Jhelam, a gift by a father to his married daughter, who has never left her father's house and whose husband is khandamad, is valid against collaterals of the father.

*Petition for revision under section 70 (a) and (b) of Act XVIII of 1884 from the decree of Captain J. Frizelle, Additional Divisional Judge, Jhelam Division, dated 5th July 1909.*

Duni Chand, for petitioner.

(1) 19 P. R. 1874

(2) 123 P. R. 1879.

(3) 23 P. R. 1884.

(4) 44 P. R. 1884.

(5) 130 P. R. 1888.

(6) 148 P. R. 1890.

(7) 140 P. R. 1908.

(8) 110 P. R. 1906, P. R.



The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—I see no reason for interference. 5th Feb. 1910.

The Courts below have found that a gift by a father to his married daughter, who has never left her father's house and whose husband is *khanadamad*, is valid against collaterals of the father. The parties are Kahuts of Thirpal in the Chakwal *tahsil*, Jhelam.

The entry in the *Riwaj-i-am* that a Kahut can make a gift to his daughter, has been supported by five instances, and *Wali Dad v. Ala Dad* (1), with the case cited therein, is in point, while the Customary law of the Jhelam District at page XXII, Appendix II, Part X, cites two instances of gift to a stranger in the presence of collaterals from this very village.

I concur in the decision of the Courts below, and reject this application.

*Revision rejected.*

### No. 32.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.*

*Mr. Justice Chevis.*

BAHADUR SHAH—(DEFENDANT)—APPELLANT,

*Versus*

RAM SINGH AND OTHERS—(PLAINTIFFS)

AND

MUSSAMMAT MUHAMMAD NISHAN—RESPONDENTS.  
(DEFENDANT).—

Civil Appeal No. 652 of 1909.

*Estoppel—Civil Procedure Code, Act XIV of 1882, sections 13 and 43—  
Merger of mortgage in previous money decree—Cause of action—Relation-  
ship of landlord and tenant—Jurisdiction of Civil Court—Appeal under  
section 70 (1) (b)—Findings of fact.*

In 1888 B. S., a usufructuary mortgagee, sub-mortgaged his rights to G. S., the terms being that the latter should be put into possession and that the former should be personally liable for the mortgage-money. In 1900 G. S. sued for principal and interest, alleging that he had never been put into possession and obtained a decree for the principal only against the property mortgaged, as according to the statement of B. S. (the defendant), G. S. had been holding possession. This decree was affirmed on appeal in 1901, but in consequence of the enactment of the Land Alienation Act, XIII of 1900, G. S. did not execute his decree, and in

(1) 72 P. R. 1900.

1907 he brought the present suit for possession on the ground that B. S. had denied his title in 1905. The Lower Courts found that G. S. had constructive possession of the land till 1905, and that there was no new agreement between the parties in 1901 and decreed plaintiff's claim.

*Held*, that as the value of the suit and appeal for purposes of jurisdiction was less than Rs. 1,000 no further appeal lay, and the Lower Appellate Court's findings of fact could not be impugned—

*Held* also, that—

(1) G. S.'s allegations in the former suit did not estop him from alleging in the present suit that he was in possession of the property up to within 12 years of the present suit ;

(2) the suit was within limitation ;

(3) neither section 13 nor section 43 of the Civil Procedure Code, Act XIV of 1882, was a bar to the suit ;

(4) the mortgage did not merge in the decree obtained by G. S. in 1900, and a cause of action on the mortgage survived ; and

(5) the facts found did not establish the relation of landlord and tenant between the parties and the Civil Courts consequently had jurisdiction.

*Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 8th March 1909.*

Muhammad Iqbal, for appellant.

Govind Das, for plaintiffs-respondents.

The judgment of the Court was delivered by—

26th Feb. 1910.

SIR ARTHUR REID, C. J.—A preliminary objection, that no further appeal lay, the value of the suit and appeal for purposes of jurisdiction being less than Rs. 1,000, and the Courts below having concurred, was not seriously contested and was allowed, 24 P. R. (Full Bench) 1903 not being of any assistance to the appellant.

The appeal was, therefore, treated as having been admitted under section 70 (1) (b) of the Courts Act, the Lower Appellate Court's findings of fact being final.

These findings are not as clear as the findings of the Court of First Instance, and, as the Lower Appellate Court concurred with the Court of First Instance, the findings of the latter Court may be used to supplement those on which the law applicable had to be considered.

The findings are, (1) that Babadur Shah, a usufructuary mortgagee, sub-mortgaged to Gurmukh Singh in August 1888, the terms being that the latter should be put into possession,

and that the former should be personally liable for the mortgage-money; (2) that in August 1900, within limitation, Gurmukh Singh sued for the principal and interest alleging that he had never been put into possession; (3) that Gurmukh Singh obtained a decree for the principal against the property mortgaged, (4) that Gurmukh Singh's appeal against so much of the decree, as dismissed the suit for interest, was dismissed, (5) that in consequence of the enactment of the Land Alienation Act Gurmukh Singh did not execute his decree; (6) that Gurmukh Singh had obtained constructive possession of the property mortgaged through tenants, and that such possession continued till 1905, when Bahadur Shah denied his title; (7) that there was not a new agreement between the parties in 1901.

On these findings we are satisfied (1) that Gurmukh Singh's allegations in the suit of 1900 do not estop him from alleging in this suit that he was in possession of the property up to within 12 years of the present suit; (2) that the suit is within limitation. Counsel for the appellant cited various reported rulings and *dicta* in *Ghose on Mortgages* for the proposition that section 43 of the Code of Civil Procedure barred the present suit, the plaintiffs-respondents having sued in 1900 for recovery of the mortgage-money without suing for possession, but these authorities are not actually in conflict with *Ganda Mal v. Nanak Chand* <sup>(1)</sup>, *Vussammat Prab Devi v. Harkishen Das* <sup>(2)</sup>, *Bhola Singh v. Gurdit Singh* <sup>(3)</sup>, *Raja Bikrama Singh v. Prab Dial* <sup>(4)</sup> and *Veerana Pillai v. Muthukumara Asury* <sup>(5)</sup>, which are ample authority for holding that section 43 was not a bar to the suit.

The proposition that section 13 of the Code was a bar to the suit is equally untenable, as is the proposition that the mortgage merged in the decree obtained by the respondents in 1900, and that no cause of action on the mortgage survived.

The question of the *status* of the parties and the jurisdiction of the Civil Courts presents more difficulty.

The Court of First Instance found that the land was cultivated by tenants; that the appellant was a *lambardar*; that he agreed to realise the produce from the tenants and to make over the surplus, after payment of Government revenue to the mortgagee; and that he was consequently the mortgagee's agent.

<sup>(1)</sup> 3 P. R. 1887.

<sup>(2)</sup> 47 P. R. 1834.

<sup>(3)</sup> 66 P. R. 1884.

<sup>(4)</sup> 129 P. R. 1889, F. B.

<sup>(5)</sup> (1904) I. L. R. 27 Mad. 102.



These findings were not attacked in the memorandum of appeal below and may be treated as having been accepted by the Lower Appellate Court.

The cause of action was the denial of the mortgagee's right to possession and the assertion of the title of the appellant to possession through the subsisting tenants. The facts found do not, in our opinion, establish the relation of landlord and tenant between the parties. The point was not taken in the memorandum of appeal in this Court and no authority against the jurisdiction of the Civil Court was cited, but we have considered the point inasmuch as it is one of jurisdiction.

The appeal fails and is dismissed with costs.

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**No. 33.**

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and  
Hon. Mr. Justice Johnstone.*

**HAZARA SINGH—(PLAINTIFF)—APPELLANT,**

*Versus*

**GANDA AND OTHERS—(DEFENDANTS)—RESPONDENTS.**

**Civil Appeal No. 595 of 1909.**

*Pre-emption—Sale by Jat Sikh of a plot of land to an Indian Christian for the purpose of building a Christian Church or School—Pre-emptor not bound to carry out such purpose.*

*Held*, that when a plot of land is sold by a Jat Sikh to a Native Christian and the deed of sale states, that it is purchased by the latter for the purpose of erecting a Christian Church or School without any stipulation for avoidance of the sale if no such building is erected, a pre-emptor can take over the bargain without agreeing to erect such a building and the principle laid down in *Buldeo Das v. Piare Lal* <sup>(1)</sup> does not apply to such a sale.

*Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 26th November 1908.*

**Ishwar Das**, for appellant.

**Oertel**, for respondent.

The judgment of the Court was delivered by

**22nd Dec. 1909.**

**JOHNSTONE, J.**—The sole question in this case is whether a suit for pre-emption lies upon a sale of a plot of land by a Jat Sikh to an Indian Christian, stated in the deed to be purchased by the latter for the purpose of building a Christian Church or

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<sup>(1)</sup> 24 P. R. 1901.

School, the sale being followed by the immediate erection on the land of a *kotha* in which a cross was set up ?

Under the statute law contained in Punjab Act II of 1905 a suit for pre-emption would certainly lie. In section 13 (2) of that Act certain buildings are exempted from the law of pre-emption ; but there is no statutory exemption for land sold for the purpose of constructing such a building ; and therefore if there is any bar at all, it must be sought for elsewhere.

The first Court followed *Baldeo Dass v. Piare Lal*, (1) (or what it understood as the principle of that ruling) and dismissed the suit ; and the Lower Appellate Court took the same view ; but we are inclined to think that authority distinguishable. The learned counsel for the appellant impugns the ruling as radically unsound, but we are not prepared to agree with him. The *ratio decidendi* seems to us to be contained in the two last sentences of the judgment, which run thus and in which we underline the words of special significance.

“ Thus we find on the facts that a vendor has in good faith  
“ sold his land for a certain specific purpose on certain specific  
“ terms to a vendee, who is ready and willing to carry out his  
“ share in the contract, a third person wishes to oust the vendee  
“ and obtain the land in effect without paying a portion of the  
“ price and that portion the non-payment of which was under the  
“ term of the sale to render it void. We do not think he can do this  
“ under the law of pre-emption as it stands in this Province....”  
To explain this, we may say here that the sale was of a piece of land by one Hindu to another, expressly on condition that the vendee should build a *dharmshala* on the land, on default the sale to be deemed rescinded. The principle then is, that when attached to a sale of land there is a condition created by the vendor on violation of which the sale was to become void, the pre-emptor can only succeed if he undertakes to carry out that condition. Here it would be absurd to say that there was any condition created by the vendor that a Church or Christian School should be built, though it may be he sympathised with the object vendee had in his mind ; and there was certainly no stipulation for avoidance of the sale, if no such building were erected. There is merely in the deed an expression of vendee's purpose in buying the land. The decisions of both the lower Courts, therefore, appear to us unsound. We are thus obliged

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(1) 24 P. R. 1901.

to accept the appeal, and setting aside the judgments and decrees of the Courts below, we remand the case to the Divisional Judge under Order XLI, Rule 23 of the Code for disposal of the remaining points, ruling at the same time that there is no bar to this suit and that plaintiff has a right to pre-empt and to ignore the expression in the deed of sale of intention to build a Church or School.

Costs to be costs in the cause. Stamp on appeal refunded.

### No. 34.

*Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Williams.*

WAZIR ALI AND OTHERS—(DEFENDANTS)—APPELLANTS,

*Versus*

SHEIKH MULKYAR—(PLAINTIFF)	} RESPONDENTS.
AND	
FAUJ DAR—(DEFENDANT)	

Civil Appeal No. 65 of 1909.

*Civil Procedure Code, Act XIV of 1882, section 525—Suit based on award—right of appeal.*

*Held*, that a suit can be brought upon an award independently of the summary procedure authorized by section 525 of the Civil Procedure Code, 1882, at any period which the law for the limitation of suits permits, and a decree made in such a case is appealable though there would be no appeal from a similar decree made in the summary proceedings under Chapter XXXVII of the Code.

*Appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated the 18th December 1903.*

Sheo Narain, for appellants.

Muhammad Shafi and Umar Bakhsh, for respondents.

The judgment of the Court was delivered by

26th Nov. 1909.

WILLIAMS, J.—We do not think that the judgment of the learned Divisional Judge holding that no appeal lies can possibly be upheld.

The Lower Appellate Court appears to have treated the plaint as if in some way it fell under section 525 of the Civil Procedure Code. We are unable to understand on what grounds it came to this decision. In the first place the plaint is stamped on the full value of the suit and not as an application, in the second place it does not purport to be an application under



section 525, in the third place as an application under section 525 it was long time-barred, in the fourth place it only relates to a part and not to the whole of the award, in the fifth place it asks for alternative relief, and in the sixth place as it related in part to land in Kapurthala the award could not have been converted into a decree in a British Indian Court. It is, however, unnecessary for us to labour the point as counsel for respondent has admitted, that a suit can be brought upon an award independently of the summary procedure authorized by section 525 of the Code of Civil Procedure, and it is obvious that this is such a suit.

Now this being a suit brought in the ordinary manner the question naturally arises, what statutory bar is there which prevents a decree given therein from being appealable like any other decree, and the answer is, that there is none. The point has indeed been taken that it is improbable that a decree given in a mere summary proceeding under Chapter XXXVII of the Code should be non-appealable, while an exactly similar decree given in a regular suit should be appealable. That, however, rather raises the question whether there ought to be an appeal allowed than whether there is one. But even taken at its face value the argument is not convincing. An award can only be filed as the result of a summary proceeding, provided that it is free from each and all of the defects indicated in section 520, and it can only be so filed within six months of its being given. A suit, however, can be well based upon a defective award, the Court having power to rectify defects, and it can of course be brought at any period which the law for the limitation of suits permits, and, therefore, at a period when the subsequent conduct of the parties may have materially affected their rights in equity to have the terms of the award enforced. (*See Dharm Das v. Ajudhia Pershad* (1), page 222, *ab initio*). It is obvious therefore, that there must be infinitely greater opportunities for *bona fide* controversy and therefore greater justification for allowing an appeal in the case of a suit based upon an award than in the case of proceedings taken under section 525. At any rate the fact remains that the decree is normally appealable, and we are aware of no enactment which takes away the right of appeal.

We accept this appeal and return the case to be disposed of on the merits by the Divisional Court. The appellant's costs in this Court to be paid by respondents.

*Appeal accepted*

(1) 77 P. R. 1882.

## No. 35.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

MUSSAMMAT IDO—(DEFENDANT)—APPELLANT,

*Versus*

RULIA—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1074 of 1909.

*Minor—appearance by—Guardian ad litem—Effect of decree against minor.*

Where in the Lower Appellate Court one of the respondents, a girl (who was a minor), was described merely as being plaintiff's wife and not as a minor, and the appeal was decided without any guardian *ad litem* having been appointed to her—

*Held*, that the girl, not having been represented by a guardian, could not be treated as having appeared, though actually present in Court, and that the decree could not be treated merely as an *ex-parte* decree, and must be set aside.

*Further appeal from the decree of H. Harcourt, Esquire, Additional Divisional Judge, Shahpur Division, dated the 19th June 1909.*

Prabh Dial, for appellant.

Muhammad Din, for respondent.

The judgment of the learned Chief Judge was as follows :—

5th March 1910.

SIR ARTHUR REID, C. J.—The first point taken in appeal is that the decree of the Lower Appellate Court must be set aside, because the minor respondent in that Court, Mussammatt Ido, was not represented by a guardian and could not be treated as having appeared, though actually present in Court. *Dakeshur Pershad Narain Singh v. Rewat Mehton* <sup>(1)</sup>, *Bhura Mall v. Har Kishan Das* <sup>(2)</sup> and *Hanuman Prasad v. Muhammad Ishaq* <sup>(3)</sup> support this contention, while *Venkata Chandrasekhara Raz v. Alakarajamba Maharani* <sup>(4)</sup> supports the contention that the girl's mother, who had been appointed her guardian *ad litem* in the court of first instance, should have been brought on to the record of the appeal and should have been served with notice of suit. The girl was described merely as being the plaintiff's wife, and was not described as a minor in the memorandum of appeal, but the Divisional Judge, who recorded in his judgment that she was 16 years of age, should have appointed a guardian *ad litem* if the mother did not wish to act, and should not have

<sup>(1)</sup> (1897) *I. L. R.* 24 Cal. 25.

<sup>(2)</sup> (1902) *I. L. R.* 24 All. 383.

<sup>(3)</sup> (1906) *I. L. R.* 28 All. 137.

<sup>(4)</sup> (1899) *I. L. R.* 22 Mad. 187.

proceeded with the appeal against the unrepresented minor. The decree cannot be treated merely as an *ex parte* decree, but must be set aside.

I decree the appeal, set aside the decree of the Lower Appellate Court and remand the appeal for disposal in accordance with law, with due regard to the fact that the appellant below did not within limitation implead the minor through a guardian. Costs of this Court will be costs in the cause.

### No. 36.

*Pefore Hon. Mr. Justice Rattigan.*

SANT RAM—(PLAINTIFF)—APPELLANT,

*Versus*

RAM CHAND AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 705 of 1909.

*Receiver—appointment of—Civil Procedure Code, Act V of 1908, Order XL, rule 1—Appeal from order refusing to make appointment—Discretionary power of First Court not lightly interfered with by Appellate Court—Receiver not to be appointed on mere apprehension of waste.*

*Held* on the authorities cited, that an appeal lies from an order refusing to appoint a receiver under Civil Procedure Code, 1908, Order XL, rule 1—

*Held also*, that the exercise of the jurisdiction to appoint a receiver is not a matter *ex debito justitiæ*, and it is for the Court, to which the application is made, to decide in its discretion, whether or not it will act upon that application, and the Appellate Court should not interfere with the opinion of the First Court unless it finds such opinion to be either arbitrary, vague or fanciful.

*Held further*, that a receiver should not be appointed, when the application is based, not upon any specific allegation of misconduct, but upon a mere apprehension that the defendant, though he has done nothing in the past, will after the institution of the suit forthwith proceed to waste the property, and that this principle is applicable also to the case where one of three Hindu brothers seeks partition of the joint family property.

*Appeal from the order of Mian Abdul Humid, District Judge, Attock District, at Campbellpur, dated 11th June 1909.*

Ishwar Das, for appellant.

Pestonji Dadabhai, for respondents.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—The plaintiff and the two defendants in this 24th Feb. 1910. suit, which is one for partition of property, are three brothers,



and of them defendant No. 1, Ram Chand, is the eldest. He is practically the sole defendant, as defendant No. 2, Kashi Ram, is to all intents and purposes a co-plaintiff. Immediately after the institution of the suit, the plaintiff prayed the Court to take action under order 40, rule 1, and appoint a receiver of the property, and the grounds upon which this application was based were that there was enmity between the brothers, resulting in various criminal proceedings, and that plaintiff was apprehensive that defendants would waste the property. Defendant No. 2, who I may observe was equally implicated with defendant No. 1 so far as plaintiff's allegations were concerned, forthwith admitted the reasonableness of the application. Defendant No. 1 on the other hand who, as the eldest brother, has for several years past been managing the estate without objection on the part of his younger brothers, contested the application.

The District Judge, in a well-considered order, reviewed the facts, and after hearing counsel on both sides came to the conclusion that no case for the appointment of a receiver at the present stage of the proceedings had been made out. He points out in support of his conclusion that the property is admittedly in the hands of the head of the joint family to which the parties belong. This is a fact which cannot be gainsaid, and I might add that the property has for years past been in the hands of that person. He further states, that there is no specific allegation of misappropriation or malversation, and that at the utmost all that plaintiff can say is, that he fears that he will suffer loss, if the property is allowed to remain in the hands of his brother. The learned Judge accordingly refused to appoint a receiver of the property. From this order the plaintiff has preferred an appeal to this Court. I may at once state, that I am in some doubt whether an appeal lies from an order refusing to take action under order 40, rule 1. Under order 43, (1) (s) an appeal unquestionably lies from an order passed under order 40, rule 1, or rule 4, but can it be said that an order, refusing to pass an order under order 40, is an order under either of those rules? I confess, if the matter were *res integra*, I should have great difficulty in so holding. But it has been held by high authority that a similar order, passed under the Civil Procedure Code of 1882, was appealable under section 588 (24) of that Code, and as the provisions of the two Codes upon this point are practically indistinguishable, so far as the present question is concerned, I defer to these authorities, and hold that an appeal does lie. See

*Venkatasami v Stridavamma* (1), *Gossain Dalmir Puri v. Tekant Hetnarain* (2), *Khagendra Narain Singh v. Shashadhar Jha* (3), *Sangappa v. Shivbasawa* (4). But, conceding that an appeal does lie, am I as a Court of Appeal justified in interfering with the order of the District Judge in this case ?

The exercise of the jurisdiction to appoint a receiver under order 40, rule 1 is clearly not a matter *ex debito justitiæ*, and it is for the Court to which the application is made, to decide in its discretion whether or not it will act upon that application. The Code in express terms leaves it to the Court to make the appointment, if in the opinion of that Court, the appointment would be "just and convenient." This discretion must of course be exercised reasonably and judicially, and it is open to the Appellate Court to consider in any particular case whether or not that discretion has been properly exercised. But in all such cases the opinion of the Court of first instance is entitled to great weight. (*The Oriental Bank Corporation v. Gobinlall Seal* (5) at page 737), and I have no hesitation in saying that its opinion should not be set aside, unless it is found by the Appellate Court to be either arbitrary, vague or fanciful. The mere fact that the Appellate Court might in the first instance have come to a different conclusion would not, I think, justify it in setting aside the original Court's order, if that order were otherwise legal and regular and in no sense unreasonable. In the case before me I cannot hold that the District Judge acted unreasonably in refusing to accede to plaintiff's application. On the contrary, I am of opinion, that no sufficient grounds were set forth to justify him in taking the extraordinary action for which in proper cases order 40, rule 1 makes provision.

The three brothers have, it would seem, for some time past been quarrelling *inter se*, and they have even gone so far as to carry their quarrels into the Criminal Courts. But the facts remain that the elder brother is the head of the family, and it is he who has for years past been managing the family property and its affairs. And yet plaintiff can point to no specific act of misappropriation, malversation or even mismanagement on his part.

Even in his affidavit filed in this Court, all that plaintiff can say is, that there have been disputes between the brothers and criminal cases, and that in the circumstances "there is a

(1) (1886) *I. L. R.* 10 *Mad.* 179 *F. B. J.* (3) (1904) *I. L. R.* 31 *Cal.* 495.

(2) (1879) 6*Cal. L. R.* 467.

(4) (1900) *I. L. R.* 24 *Bom.* 38.

(5) (1884) *I. L. R.* 10 *Cal.* 713.

“great apprehension of misappropriation of the joint property “consisting of the outstanding debts and the produce.” The very fact that despite all these proceedings the plaintiff is unable to refer specifically to any act of waste or misappropriation or mismanagement on the part of defendant No. 1, is in itself a sufficient answer to his present claim for the appointment of a receiver. As observed by the High Court of Allahabad in a well-known case (*Srimati Prasonmayi Devi v. Bani Mailhab Rai*) (1)—“the discretion given by section 503 of the Code to the “High and District Courts alone, be it observed, is one that “should be exercised with the greatest care and caution. Because “a plaintiff in his plaint makes violent and wholesale charges of “waste and malversation against a defendant in possession of “property, and upon this basis applies for a receiver to be appointed, it is not a necessary consequence that such appointment should be made. If any such doctrine or principle were “to be recognized, section 503, instead of serving the useful purpose for which it was framed, would give unscrupulous and “rancorous litigants an engine for the most unjustifiable interference with the rights of property under the pretence and protection of legal sanction.”

It seems to me that these remarks are as appropriate to a case where one of three Hindu brothers is seeking a partition of the joint family property as to any other case. By the personal law of the parties the eldest brother is in the position of manager of that property, and it is not denied that for some time past he has been acting in that capacity. Is this property to be suddenly taken out of his control, because a younger brother asks for a judicial partition of it and with his plaint makes a further application for the appointment of a receiver, when the latter application is based, not upon any specific allegation of misconduct on the part of the manager, but upon a mere apprehension that the manager, though he has apparently done nothing amiss in the past, will after the institution of the suit forthwith proceed to waste the property? I cannot possibly think so.

Mr. Ishwar Das contends that in cases where one member of a Hindu joint family seeks partition of the property, a receiver ought to be appointed as a matter of course, if the plaintiff so desires, but for this very general proposition he could refer me

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(1) (1883) I. L. R. 5 All. 556.



only to the case of *Hanumayya v. Venkata Subhayya* <sup>(1)</sup>. This authority in no way lends countenance to the learned advocate's argument, for it appears that in that case the *manager of the family had for some time past misappropriated large sums of money and had thrown the accounts into confusion*. The plaintiff accordingly applied for the appointment of a receiver, but his application was rejected by the District Judge. The High Court, on appeal, set aside the District Judge's order, and in their judgment observed—"The reason assigned by the District Judge for declining to appoint a receiver is, that the acts complained of amount to misappropriation rather than waste, and that petitioners can thereafter institute a criminal prosecution. These are clearly not sufficient reasons. Section 503 of the Civil Procedure Code authorises the appointment of a receiver for the preservation or better custody of property, the subject of a suit. Whether property is wasted or misappropriated, makes no difference for the purpose of this section." It is not easy to see how this case can be cited as an authority in support of the learned advocate's sweeping contention, that in every case of partition, the appointment of a receiver should be a matter of course. The other cases cited by him—*Poresh Nath Mokerjee v. Omerto Nath Mitter* <sup>(2)</sup> and *Mussammatt Budhwanti v. Mussammatt Bishen Kaur* <sup>(3)</sup> are equally irrelevant. In the former case it was held by the High Court, that *even* in suits for partition of joint property, the Court had jurisdiction to appoint a receiver, the argument being that in such cases, inasmuch as the plaintiff is suing only for his share of the property, the whole joint estate is not "property, the subject of the suit" within the meaning of section 503 of the Code, and that consequently the Court had no jurisdiction to appoint a receiver of anything more than the plaintiff's share. So far from telling in plaintiff's favour, this authority would seem to suggest that it was open to argument whether in a partition case a receiver of the whole property could be appointed at all. The Punjab case is in no way relevant. There the dispute was between two ladies, and it was shown that the agent, who had been managing the property, had been behaving dishonestly and had favoured one of the ladies to the prejudice of the other. This Court distinctly found that "the plaintiff's rights

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<sup>(1)</sup> (1895) 1 L. R. 18 Mad. 23.    <sup>(2)</sup> (1890) 1 L. R. 17 Cal. 614.

<sup>(3)</sup> 73 P. R. 1902.

“are being set at naught, and her share of the income is being made away with without reference to her wishes.....The danger to plaintiff's interests is immediate and beyond question, and the necessity for a receiver to protect them is self-evident.”

I agree with the District Judge that in the present case the plaintiff has not shown the necessity for the appointment of a receiver, and I, therefore, dismiss this appeal with costs. If hereafter the plaintiff can satisfy the Court trying the suit, that defendant No. 1 has been guilty of misconduct in respect of the property in dispute, it will be open to him to apply again under order 40, rule 1, for the appointment of a receiver. But as matters stand, he is obviously unable to make specific allegations of the kind at present against the managing member of the family, and for this reason his application has very rightly been rejected by the District Judge.

*Appeal dismissed.*

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**No 37.**

*Before Hon. Mr. Justice Rattigan.*

**JHANDA SINGH AND OTHERS—(DEFENDANTS)—APPELLANTS,**

*Versus*

**KESAR SINGH—(PLAINTIFF)—RESPONDENT.**

**Civil Appeal No. 777 of 1909.**

*Custom—Succession—Adopted son and his son succeed to property in natural family, agricultural tribes, Gurdaspur District.*

*Held*, that the ordinary rule under the Customary Law is that an adopted son does not lose the right of succeeding in his natural family except possibly in the eastern Punjab (i. e., the Delhi and Karnal districts), where the appointment of an heir approaches in nature more nearly to the adoption of the Hindu Law, and this applies *a fortiori* in the case of a son of the adopted son.

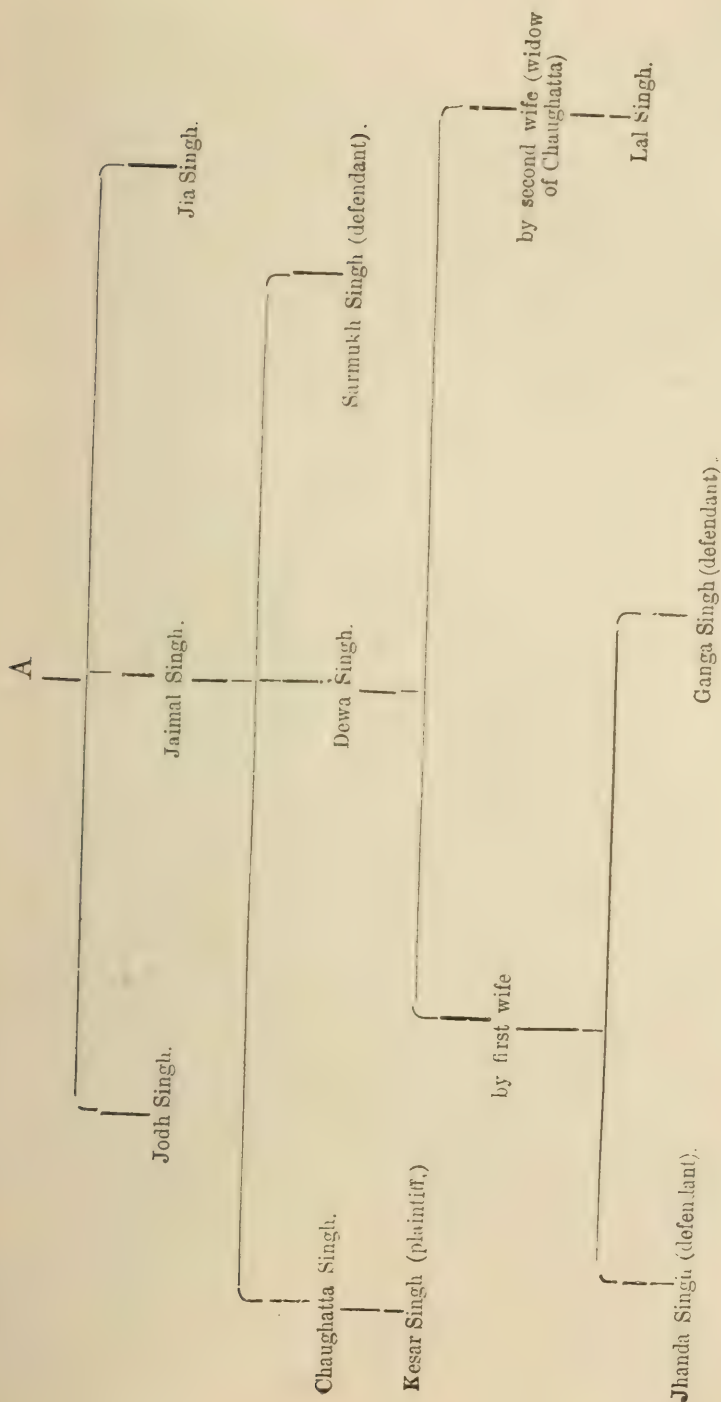
*Further appeal from the decree of W. A. Le Rossignal, Esquire, Divisional Judge, Amritsar Division, dated the 27th January 1909.*

**Kamal-ud-din and Duni Chand, for appellants.**

**Gurbarn Singh and Gokal Chand, for respondent.**

The judgment of the learned Judge was as follows—

RATTIGAN, J.—The following table will tend to elucidate the facts of this case :—





It is found by the Divisional Judge as a fact (and this finding is clearly binding on me as a Court of revision) that Jodh Singh adopted Chaughatta, and it is not denied that if this adoption (or rather the ordinary customary appointment of an heir) took place at all, it must have occurred when Chaughatta was quite an infant, and that Kesar Singh (the plaintiff), who was the natural son of Chaughatta, was born after his natural father had been adopted by Jodh Singh. Chaughatta died during the lifetime of Jodh Singh, and in 1878 the latter purported to make a gift of the whole of his property to Kesar Singh. In point of fact he actually handed over only half of his property to the donee and in 1890 he made a gift of the other half to Lal Singh (the half-brother of Kesar Singh). Kesar Singh apparently took no objection to the gift to Lal Singh, though it would seem that he had every right to challenge it, not only because he was the son of Jodh Singh's adopted son and therefore Jodh Singh's heir, but also because the whole property had been gifted to him in 1878. Jodh Singh, when making the gift in 1890 to Lal Singh, speaks of the latter as "his adopted son," but of this adoption there is no other proof. Kesar Singh now seeks to succeed to a share in the property of his grandfather, Jaimal Singh. Defendants plead that as plaintiff has already succeeded to the property of Jodh Singh, he is not entitled to any share in the property of Jaimal Singh unless and until he brings into hotchpot the property he has received from Jodh Singh. The Courts below have decreed in plaintiff's favour but on different grounds. The Munsif holds that Chaughatta was never adopted by Jodh Singh and was merely a donee from the latter, and that consequently he did not lose his right to succeed to his natural grandfather. The Divisional Judge, on the other hand, holds that Chaughatta was adopted by Jodh Singh, but that the tie existing between the two was a purely personal one and came to an end when Chaughatta died in Jodh Singh's lifetime. He agrees with the Munsif however in finding that Jodh Singh made a gift of part of his property to Kesar Singh and that this gift cannot operate to debar plaintiff from claiming the share to which (but for the adoption of his father) he would have been entitled in the property of his natural grandfather.

I confess I do not myself see the importance of this fact of gift, for it appears to me that on general principles Kesar Singh would in any event have been entitled to succeed to the

property of Jodh Singh, even though his father (the adopted son of Jodh Singh) had died in the lifetime of the latter. The ruling of this Court in *Chajju v. Dilip* (1), which was based upon the general principles of Customary Law, is a direct authority in this connection. It is true that Jodh Singh subsequently gifted half his land to Lal Singh to the prejudice of Kesar Singh, but for this fact Kesar Singh alone must take the blame. It was open to him, had he so desired, to have challenged that gift, and if he did not do so, we can only assume that he had reasons of his own for taking no steps to annul the gift. This reason may have been that Lal Singh is his half-brother. But even if it is to be held that Jodh Singh's property had come to Kesar Singh in virtue of the fact that Chaughatta was adopted by Jodh Singh, must it therefore be held that Kesar Singh is necessarily debarred from claiming a share in the property of his own natural grandfather? Possibly in the Eastern Punjab (e. g., in Delhi and Karnal districts) where more stress is laid upon the fact of adoption and its consequences, a man who has been adopted by his uncle has no right to claim a share in the property of his own natural father if the latter has left other lineal heirs, *Mukh Ram v. Not Ram* (2). That may be so, but I do not think that any such general rule can be laid down in respect of the agricultural tribes of the Gurdaspur district, to which the present parties belong. The ordinary rule undoubtedly is that an adopted son does not lose the right of succeeding in his natural family (paragraph 48 of the Digest of Civil Law for the Punjab, *Rukan Din v. Mussammatt Marian* (3), page 235) and though this rule may be modified in those parts of this Province, where the appointment of an heir approaches more nearly to the adoption of the Hindu Law, I am not aware of any authority that definitely lays it down, that the ordinary appointment of an heir among agriculturists has the effect of completely transferring the appointee from his branch of the family to that of his "adoptive" father. If this be the case as regards the appointee himself, it would *a fortiori* be the case as regards the son of the appointee. In arriving at this conclusion I am fortified by the decisions of this Court reported

(1) 51 P. R. 1906.

(2) 100 P. R. 1906.

(3) 68 P. R. 1898.

as *Diwan Singh v. Bhup Singh* <sup>(1)</sup> and *Narain v. Radha* <sup>(2)</sup>, and by the judgment of Smyth J., in *Dewa Singh v. Nihal Singh* <sup>(3)</sup> (at page 22). I accordingly dismiss this appeal with costs.

*Appeal dismissed.*

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No. 38.

*Before Hon. Mr. Justice Johnstone.*

ALLAH DITTA AND OTHERS—(PLAINTIFFS)—APPELLANTS,

*Versus*

ACHHRU MAL AND OTHERS—(DEFENDANTS) - RESPONDENTS.

Civil Appeal No. 229 of 1909.

*Occupancy holding—Succession—Punjab Tenancy Act, XVI of 1887, section 59 (c)—entry in wajib-ul arz regarding succession of bhaiya karabati—meaning of—Custom—onus probandi.*

*Held*, that where in the *wajib ul-arz* the occupancy tenants are recorded as stating, that if one of them should die without sons succession should go to *bhai ya karabati*. Such entry, if viewed (1) as a record of custom, cannot be used to override or extend the scope of section 59 (c) of the Punjab Tenancy Act, XVI of 1887, and if viewed (2) as an agreement, should be interpreted in a reasonable way, and it is reasonable to suppose that the landlords, if they agreed at all, agreed to the succession of such brothers and *karabati* only as might be entitled under tenancy law and custom, and the idea of a right according only to descendants of a person who once held the land, is a fundamental idea in the minds of the peasantry.

*Held* also, that the burden of proof is on the persons claiming occupancy rights, and they must prove that their ancestor once occupied the land.

*Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated the 9th May 1908.*

Beni Pershad, for appellants.

Jowala Pershad, for respondents.

The judgment of the learned Judge was as follows:—

18th Nov. 1908.

JOHNSTONE, J.—In my opinion these two cases have been wrongly decided by the learned Divisional Judge. I will briefly state the facts first.

In 1849—51 at Settlement Qutba was entered as occupancy tenant of the land in suit, and in the *wajib-ul-arz* the occu-

<sup>(1)</sup> 45 P. R. 1884.

<sup>(2)</sup> 42 P. R. 1886.

<sup>(3)</sup> 9 P. R. 1880.



pancy tenants are recorded as stating, that if one of them should die without sons, succession should go to *bhai ya karabati ki mustahikk hoga*. Qutba died, and his son Mada succeeded. In 1877 Mada and Nathu (see pedigree-table in First Court's judgment) mortgaged the occupancy rights jointly to Achru Ram, and later Mada alone effected another mortgage, which absorbed that mortgage. Now that Mada is dead, and his son Imam Din has to be presumed dead—about this there is no question now—the landlords claim the land, and claim also that the mortgage is extinct along with the tenancy. There can be no doubt that, if the occupancy rights are extinct, the mortgage is so also.

The First Court found that Bura (common ancestor of Mada and Nathu) is not proved ever to have occupied the land, and so gave a decree. The Lower Appellate Court, basing its argument upon the aforesaid *wajib-ul-arz* entry, which it conceded was not an "agreement" but only a statement of custom, found that Khuda Bakhsh's family, as *karabatis*, were entitled to succeed, and so dismissed the suit.

I will take the *wajib-ul-arz* first. I am inclined to agree with the Lower Appellate Court that the entry is not an "agreement"; but, if this is so, the entry cannot help defendants at all, for it is settled law that custom, as such, cannot be used to override, or extend the scope of section 59 (c) of the Tenancy Act. Under that section no collateral can succeed to an occupancy tenancy unless an ancestor of his has held the land.

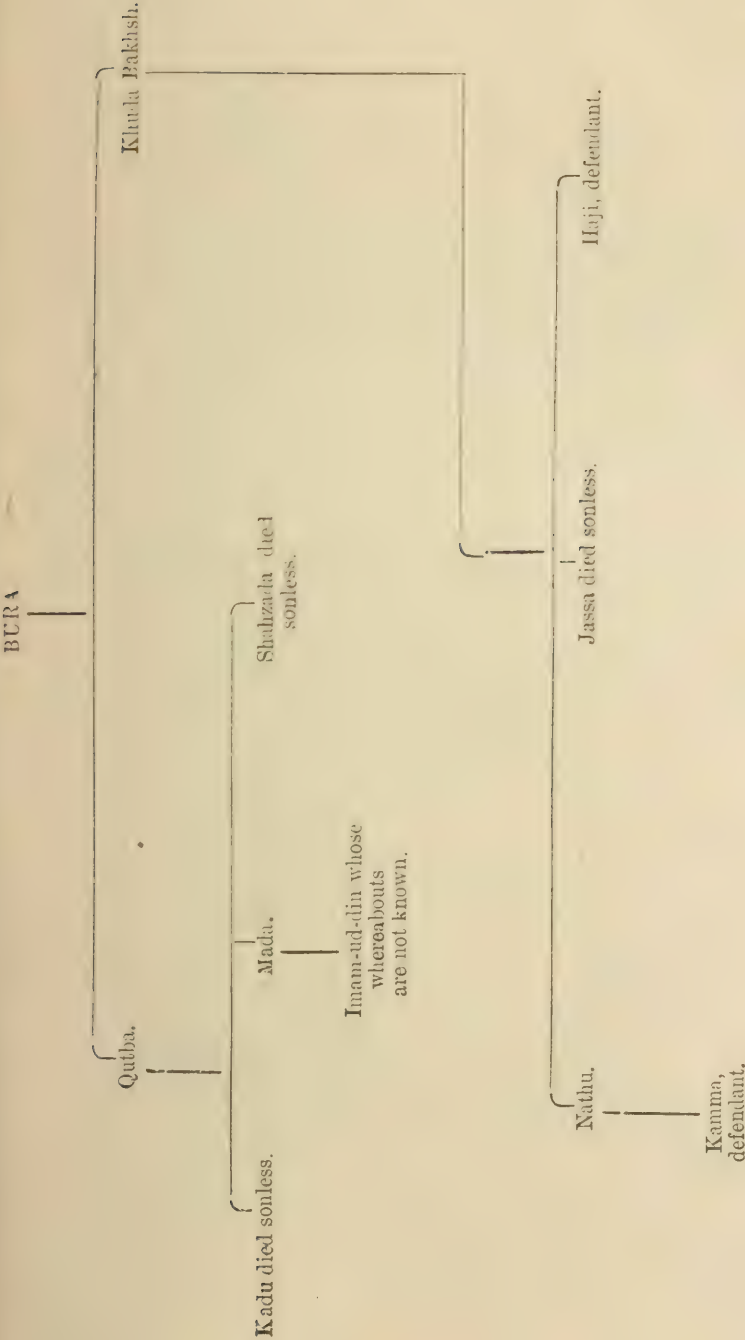
But, even if the entry is an "agreement", I do not think it helps defendants. As pointed out by a Division Bench in a comparatively recent case, which I am unable to find at the moment, entries of this sort must be interpreted in a reasonable way. Section 59 (c) aforesaid was not an invention of the legislature, it was intended to meet more or less the sentiments and habits of the people, and, therefore, unless the indications that way are perfectly clear, it is impossible to hold that the landlords in 1851 agreed, that when an occupancy tenant died, any *karabati* should succeed. It is reasonable to suppose that the landlords, if they agreed at all, agreed to the succession of such brothers and *karabatis* as might be entitled under tenancy law and custom, and this idea of a right accruing only to descendants of a person who once held the land, is a fundamental idea in the minds of the peasantry. I hold, then, that defendants cannot succeed in this case on the strength of the *wajib-ul-arz*.

The next point is, whether Bura was ever an *occupancy* tenant of the land in suit. In favour of the proposition is the deed of 1877 alone, which was apparently not put in in the First Court. From it no inference against the landlords can be drawn. They were no parties to it, and their "acquiescence" in the proper sense of the word is not proved. Farther, the inference is negative by the later deed by Mada alone, and by the fact that Khula Bakhsh's family have never been shown in the Revenue records as having any part or lot in the occupancy rights. I hold unhesitatingly that Bura was never occupancy tenant.

The last and most difficult question is, whether Bura ever occupied the land in any capacity. I agree with the First Court that the direct evidence is worthless. Indeed, the only thing in favour of the idea is, that in 1849 Qutba was shown as occupancy tenant or *mazaria maurusi*. From this it is attempted to draw an inference that his father, Bura, must have had the land before him, and Civil Appeal No. 1277 of 1906 has been cited as a precedent. No doubt at first sight such an entry as the above does give rise to an impression that the occupancy tenant's father at least must have held the land; but each case must be decided on its own facts. Here I am told by *defendants'* counsel, instructed by his client or clients, that Mada died about 1890 or 1891, some 70 or 80 years old. This shows that Mada was born between 1810 and 1821, so that Qutba must have been 60 or 70 in 1851. He may thus have held the land *himself* 30 or even 40 years when he was admitted to occupancy rights, and in these circumstances the entry leads to no necessary inference at all with regard to his father. In those days after a continuous personal tenancy of so long as that occupancy rights would have been conceded, and so the father does not necessarily come in at all. It should always be borne in mind in these cases that the burden of proof is on the persons claiming occupancy rights, and *they* must prove that the ancestor once occupied the land. Here I can find no such proof. For these reasons I accept both appeals, and restore the decrees of the First Court with costs throughout.

*Appeal accepted.*

Copy of pedigree-table in first Court's judgment :—





## No. 39.

*Before Hon. Mr. Justice Johnstone.*

GANGA RAM—(PLAINTIFF)—APPELLANT,

*Versus*

POKHAR DAS AND OTHERS—(DEFENDANTS)—

RESPONDENTS.

Civil Appeal No. 923 of 1909.

*Indian Limitation Act, XV of 1877, section 19—Acknowledgment—Mortgage entry in settlement record—Signature of one of the mortgagees and of Settlement Officer.*

*Held*, that where a suit is brought to redeem a mortgage more than 60 years old, and the plaintiff relies upon an entry in a settlement record (the signature of one of the two mortgagees being found at the end of the *muntakhīb khewat* papers, in which the entry of mortgage occurs, though not on the entry itself) as an acknowledgment within the meaning of section 19 of the Indian Limitation Act, it must be shewn—

(a) that the Settlement Officer, who signed the record, was an agent duly authorised by the two mortgagees to make the entry of the mortgage in the *muntakhīb khewat*, or

(b) that the signature (among a mass of other signatures) of one mortgagee at the end of that document, in which it is not denied that these mortgagees are shews also as proprietors of other holdings in the village, can be properly referred to this mortgage entry.

*Held also*, that neither of these conditions obtained in the present case [Question discussed whether section 19, Limitation Act, was intended to apply to cases of acknowledgment of the continued existence of a mortgage.]

*Further appeal from the decree of T. P. Ellis, Esquire, Additional Divisional Judge, Multan Division, dated the 11th February 1909.*

Nanak Chand and Govind Das, for appellant.

Ram Bhaj Datta, for respondents.

The judgment of the learned Judge was as follows :—

11th Feb. 1910.

JOHNSTONE, J.—In this case the question is as to the application of section 19, Limitation Act, 1877, to certain facts. The mortgage in question is much more than 60 years old, but the question is, whether a new period of limitation did or did not, under section 19 aforesaid, begin to run from 1878 (which was within 60 years of the mortgage), in which year the mortgage was entered in the *misl bandobast*, the signature of one of the two mortgagees being found at the end of the *muntakhīb khewat* papers, in which the entry of mortgage occurs, though not on the entry itself. The First Court found that the section aforesaid

covered the case and so, relying on *Gul Mahomed v. Akbar*<sup>(1)</sup> and distinguishing *Bahadar v. Nanka Ram*<sup>(2)</sup>, it decreed the claim for redemption. The lower Appellate Court discussed *Lala Mal v. Ghulam Mahomed*<sup>(3)</sup>, *Maksud Ali v. Salar Baksh*<sup>(4)</sup>, *Jawala Singh v. Sher Singh*<sup>(5)</sup>, *Gul Mahomed v. Akbar*<sup>(1)</sup> and *Bahadur v. Nanka Ram*<sup>(2)</sup>, and arrived at the opposite result. Plaintiff has applied for revision and the case has been admitted as a further appeal under clause (b), section 70 (1), Punjab Courts Act.

The important parts for us of section 19 aforesaid are these—

“ If before the expiration of the period prescribed for a suit or application, in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by some person through whom he derives title or liability, a new period of limitation according to the nature of the original liability shall be computed from the time when the acknowledgment was so signed. . . . .

“ *Explanation 2.*—In this section ‘ signed ’ means signed either personally or by an agent duly authorized in this behalf.”

It is clear that in the present case we have an “ acknowledgment ” within the meaning of this section only, if—

(a) the Settlement Officer who signed the record of 1878 was an agent duly authorized by the two mortgagees to make the entry of the mortgagee in the *muntakhib*, or

(b) the signature (among a mass of other signatures) of one mortgagee at the end of that document, in which it is said (and not denied) that these mortgagees are shown also as proprietors of other holdings in the village, can be properly referred to this the mortgage entry.

[For my own part I confess to a doubt whether the section was intended to apply to cases of acknowledgment of the continued existence of a mortgage at all. In order to make it apply the word “ liability ” in the section has to be taken to cover liability to allow redemption on tender of the mortgage-money, and I have doubts whether the Legislature really had this sort

(1) 145 P. R. 1889.

(3) 32 P. R. 1880.

(2) 53 P. R. 1905.

(4) 63 P. R. 1888.

(5) 116 P. R. 1891.

of thing in its mind at all. The typical case covered by the section is written admission of a debt, and the justice and good sense of the law is there clear. The creditor demands his money. The debtor writes : " I cannot pay but I admit the debt." The law allows a fresh period for suing. In a case like the present there has been no demand to redeem with a reply by the creditor " Do not insist upon redemption now, it is not " convenient to me. I admit your right to redeem." What has happened is, that the Government, over which neither party has any control, has ordered a revision of the Revenue records, and the law lays it down that a presumption of correctness shall attach to all entries made upon revision. Government orders its officers to record *inter alia* all mortgages of land after enquiry from the persons concerned. In these *circumstances* mortgagees must at their peril produce their deeds, if they have any, or make statements regarding oral mortgages, if they have no deeds ; and, when the record is complete, the Settlement Officer has to collect all persons interested, read the whole thing to them, and sign the statement and add at foot " an order declaring that it has been *duly attested*," \* the practice being to make all persons present affix signature or seals. This happens every 20 or 30 years, and thus the result is either that a mortgagee must make an acknowledgment of his mortgage periodically and so prevent the 60 years' term from ever running out, or he must take the risk of refusing to admit that there is a subsisting mortgage. I hardly think that the Legislature contemplated results like this ; but the rulings are against me, and I do not feel disposed to go against them.]

\*Cf. para. 203 (d),  
Rules under section  
46, Land Revenue  
Act, 1887.

As regards (a) we must consider *Gul Mohamed v. Akbar*<sup>(1)</sup>, *Jawala Singh v. Sher Singh*<sup>(2)</sup> and *Bahadur v. Nanka Ram*<sup>(3)</sup>. I must confess that the first two of these rulings, though written by the same learned Judge, are not easy to reconcile, though the third ruling does attempt to reconcile them. In the first ruling the decision is really based on the signatures of the mortgagees on the Revenue Records, which were taken to refer to the mortgage entry ; but it is also hinted that the Revenue Officer was in the circumstances the duly authorized agent. In the second ruling it is plainly laid down that the officer making the entry of mortgage and signing the document at foot was *not ex officio* agent of the mortgagee ; and in *Bahadur v. Nanka*

(<sup>1</sup>) 145 P. R. 1889.

(<sup>2</sup>) 116 P. R. 1891.

(<sup>3</sup>) 53 P. R. 1905, F. B.



*Ram*<sup>(1)</sup>, where the mortgagees did not sign at all but only the Assistant Settlement Officer, who signed his own name only, it was again held that the officer was the mortgagee's duly authorized agent in regard to the making of the mortgage entry. I must hold, therefore, that condition (a) does not obtain in the present case.

As regards condition (b), the rulings noted in the margin are in point. In *Lala Mal v. Ghulam Mahomed*<sup>(2)</sup>, the mortgagee who signed owned lands in the village and so was interested in the *khewat* entries apart from the mortgage entry. It was held that the signature, which was only of one mortgagee, referred only to the ownership entries and so was no "acknowledgment" of the subsistence of the mortgage.

In *Maksud v. Ali Salar Bakhsh*<sup>(3)</sup> the *khewat* and *wajib-ul-arz* were combined in one. Only a copy of the original was in existence as the original had been destroyed in the Mutiny; and thus it was doubtful whether the names at end of document were signatures or not. In the *wajib-ul-arz* the only reference to mortgages was a general rule that redemption should only take place when land was *khali*. *Lala Mal v. Ghulam Mahomed*<sup>(2)</sup> was followed, and two other rulings in support were quoted, namely, *Deotu v. Kesho*<sup>(6)</sup> and Civil Appeal 1541 of 1883. The point was emphasized that a signature at end in a mass of other signatures could not be taken as applicable to a specific mortgage entry, when other (*i. e.*, ownership) entries existed to which it could be referred.

I have already noticed *Gul Mahomed v. Akbar*<sup>(4)</sup>. The circumstances of that case were peculiar, and I do not understand that, in connection with the point now under consideration, the principles laid down in the cases of 1880 and 1888 aforesaid were impugned. But it was explained that the mortgagors and mortgagees were closely connected, that the village was small and the sum of entries small (which was not so in the cases of 1880 and 1888), that the mortgagees must have been present, and so forth; and in this way those rulings were distinguished and an "acknowledgment" was held to exist.

In *Jawala Singh v. Sher Singh*<sup>(5)</sup>, besides the partial statement of its contents above, it was said that there must be something to connect mortgagee and signature specially with the entry.

(1) 53 P. R. 1905, F. B.

(2) 32 P. R. 1880.

(3) 63 P. R. 1888.

(4) 145 P. R. 1889.

(5) 116 P. R. 1897.

(6) 93 P. R. 1877.

*Lala Mal v. Ghulam Mahomed*<sup>(2)</sup>, *Maksud Ali v. Salar Bakhsh*<sup>(3)</sup>, *Gul Mahomed v. Akbar*<sup>(4)</sup>, *Jawala Singh v. Sher Singh*<sup>(5)</sup>.

In the present case the village is not small and there were ownership entries to which the signature might well be referred. Further, only one mortgagee signed and there is nothing to show that he was the duly authorized agent of his co-mortgagee.

For these reasons, I hold that there was no "acknowledgment" within the meaning of section 19 aforesaid, and thus the suit was barred by time.

I dismiss the appeal, but, in view of the difficulty of the case and the circumstances generally, I direct that the parties do bear their own costs in this Court.

*Appeal dismissed.*

— — —  
No. 40.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.*

*Mr. Justice Rattigan.*

MAUHO MAL—(DECREE-HOLDER)—APPELLANT,

*Versus*

JAWAHIR SINGH—(JUDGMENT-DEBTOR)—RESPONDENT.

Civil Appeal No. 272 of 1908.

*Execution of decree - Civil Procedure Code, 1882, sections 244 and 311—Application to have sale set aside by reason of defective attachment—Limitation—Indian Limitation Act, XV of 1877, Schedule II, Article 166.*

The decree-holder applied for execution by attachment and sale of the four shops 2115 to 2118 and filed a plan, correctly showing the boundaries of the shops. In the warrant of attachment the numbers were recorded as 2115, 2125, 2118, but the boundaries and measurements were accurately recorded and in the advertisement of sale the correct numbers were recorded. The sale was effected on the 10th May 1907. On the 14th August 1907 another application was filed under section 311-244 of the Civil Procedure Code, 1882, and was dismissed by the first Court on the ground that it was an application under section 311, and time-barred under Article 166 of the Indian Limitation Act, 1877. The lower Appellate Court, following *Lala Seva Ram v. Kanshi Ram*<sup>(1)</sup> found that section 311 did not apply the sale being void by reason of the attachment being imperfect. On appeal to the Chief Court—

*Held*, dissenting from *Lala Seva Ram v. Kanshi Ram*<sup>(1)</sup> and following *Sheodhyan v. Bhola Nath*<sup>(2)</sup> that the error in the warrant of attachment constituted merely a material irregularity which could be the subject of objection to the sale under section 311, Civil Procedure Code, 1882, and did not render the sale void *in so facto*, and thereby oust the provisions of section 311 and make section 244, Civil Procedure Code, 1882, applicable. The appli-

<sup>(1)</sup> 76 P. R. 1890.

<sup>(2)</sup> (1899) I. L. R. 21 All. 311.

cation must be treated as having been made under section 311, Civil Procedure Code, and was barred by limitation under Article 166 of the second Schedule of the Indian Limitation Act, 1877.

*Miscellaneous appeal from the order of B. H. Bird, Esquire, Additional Divisional Judge, Amritsar Division, dated the 7th February 1908.*

Sukh Dial, for appellant.

Sheo Narain, for respondent.

The order of the learned Judge referring the case to a Division Bench was as follows:—

CHATTERJI, J.—The judgment of the Divisional Judge follows *Lala Seva Ram v. Kanshi Ram*(<sup>1</sup>). This judgment seems to me to be erroneous, but sitting as a single Judge it would not be right for me to go against it. It is convenient therefore to refer this case to a Division Bench and counsel suggests this course to me.

6th June 1908.

I therefore send this case to a Division Bench. An early date to be fixed.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This appeal was admitted to a Division Bench for consideration of the correctness of the rule laid down in *Lala Seva Ram v. Kanshi Ram*(<sup>1</sup>) that where the formalities laid down in the Code of Civil Procedure as preliminary to a valid sale, have not been complied with, the sale is *de facto* void.

11th March 1910.

A preliminary objection that the lower Appellate Court's order of remand was not appealable, having been passed on an appeal under section 588 of the Code from an order under section 312, was overruled, on the ground that the lower Appellate Court dealt with the matter before it as one under section 244 of the Code. In any case an application for revision under section 70 (1) (a) or (b) would lie and the facts are not in dispute. They are that the decree-holders applied for execution by attachment and sale of four shops, 2115 to 2118, and filed a plan, correctly showing the boundaries of the shops.

In the warrant of attachment the numbers were recorded as 2115, 2125, 2118, but the boundaries and measurements were accurately recorded, and in the advertisement of sale the correct numbers were recorded.

The sale was effected on the 10th May 1907, and an objection based on inadequacy of price and other grounds was dismissed on the 15th June of that year.

(<sup>1</sup>) 76 P. R. 1890.



On the 14th August the application now under consideration was filed, under the heading section 311-244, and was dismissed by the Court of first instance, having been filed beyond the period of 30 days prescribed by Article 166 of the Limitation Act for an application under section 311 of the Code.

The lower Appellate Court held that section 311 did not apply, the sale being void by reason of the attachment being imperfect, and found that it was bound to follow *Lala Seva Ram v. Kanshi Ram*<sup>(1)</sup> in spite of the subsequent ruling of their Lordships of the Privy Council in *Tasadduk Rasul Khan v. Ahmad Hussain*<sup>(2)</sup>.

Their Lordships' judgment ran:—"It was contended on the part of the respondents that the non-compliance with the interval of 30 days between proclamation and sale made the sale a nullity. Their Lordships cannot accede to that contention. . . . The decree-holder failed to comply with the full requirements of section 290, but, both on principle and authority their Lordships are of opinion that the case must be treated as the respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of section 311."

In *Lala Seva Ram v. Kanshi Ram*<sup>(1)</sup>, the Court held that it appeared impossible to get over the argument, that if the Court deals with property in respect of which the formalities prescribed for attachment have not been effected, it is not dealing with property validly attached, but with something else and is acting without jurisdiction.

*Mahadeo Dubey v. Bhola Nath Dichit*<sup>(3)</sup> in which it was held that a regularly perfected attachment is an essential preliminary to sales in execution of simple decree for money, and that, where there has been no such attachment, any sale that may have taken place is not simply voidable but *de facto* void, and *Fida Hussain v. Kutub Hussain*<sup>(4)</sup> in which the Full Bench case was followed, were cited in the judgment as authority for the decision. In *Sheodhyan v. Bhola Nath*<sup>(5)</sup>, a Division Bench held that the absence of an attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is

(1) 76 P. R. 1890,

(2) (1894) I. L. R. 21 Cal. 66 P. C.

(3) (1882) I. L. R. 5 All. 86, F. B.

(4) (1884) I. L. R. 7 All. 38.

(5) (1899) I. L. R. 21 All. 311.

caused thereby, to vitiate the sale. The Court held that the principle of the 21 Cal. ruling made the decision in the 5 All. case inapplicable to the question before it.

We concur in the interpretation of the Privy Council ruling recorded in the 21 All. case, and the ruling is, in our opinion, ample authority for holding that the error in the warrant of attachment constituted merely a material irregularity, which could be the subject of objection to the sale under section 311 of the Code and did not render the sale void *ipso facto* and thereby oust the provisions of section 311 and make section 244 applicable. The application must, therefore, be treated as having been made under section 311 and was admittedly barred by limitation under Article 166.

We allow the appeal, set aside the order of the lower Appellate Court and restore the order of the Court of first instance, with costs of all Courts.

*Appeal allowed.*

### No. 41.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge,  
and Hon. Mr. Justice Rattigan.*

NUR ILAHI—(DEFENDANT)—APPELLANT,

*Versus*

UMAR BAKHSH—(PLAINTIFF)—	} RESPONDENTS.
PALA MAL—(DEFENDANT)—	

Civil Appeal No. 260 of 1909.

*Further Appeal—Suit embracing two or more distinct subjects—Value for Court-fees and for appeal different—Court-fees Act VII of 1870, sec. 17—Suits Valuation Act, VII of 1887, sec. 8.*

Where the relief sought in the plaint was—(a) a declaration that a house V was the plaintiff's property and that its sale to defendant 2 was null and void ; (b) a declaration that the plaintiff was owner of the houses R by virtue of a previous sale in his favour, or a decree for specific performance of the contract of sale ; or (c) a decree for possession by pre-emption of the houses R on payment of Rs. 600 or such amount as the Court deemed reasonable, the first relief was valued at Rs. 150, the second at Rs. 600 and the third in the alternative at Rs. 600, and the value of the houses V and R admittedly did not exceed Rs. 900 and the findings of both the Courts below were concurrent—the Chief Court—

*Held*, following *Aukhil Chunder Sen Roy v. Mohiny Mohan Das*<sup>(1)</sup>, that the actual value of the houses in litigation is the value for the purpose of further appeal, that this valuation is quite irrespective of the value for purposes of assessing the Court-fee under section 17 of the Court-fees Act, and that, therefore no further appeal under section 40, Punjab Courts Act, lay.

*Held also*, that neither section 8 of the Suits Valuation Act nor the general rule that the value for Court-fees governs the value for jurisdiction is applicable to such a suit.

*Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 5th October 1908.*

Sheo Narain, for appellant.

Fazal-i-Hussain, for respondents.

The judgment of the Court was delivered by—

11th March 1910.

SIR ARTHUR REID, C. J.—A preliminary objection, that no further appeal under section 40 of the Courts Act lies, has force.

It is not contended that the property in suit is of value in excess of Rs. 900 and the suit is unclassified. The pleader for the appellant cited *Mussammatt Fatima Begam v. Muhammad Zakaria*<sup>(2)</sup>, *Hashmat-ul-nissa Begam v. Muhammad Abdul Karim*<sup>(3)</sup>, *Neelakandhan Nambudripal v. Tirunilui Anantha Krishna Ayyar*<sup>(4)</sup> for the proposition that the value of the suit for purposes of appeal is in excess of Rs. 1,000 and that a further appeal consequently lies. Counsel for the respondents cited *Aukhil Chunder Sen Roy v. Mohiny Mohan Das*<sup>(1)</sup>. In the Punjab Record 1895 case it was held, that a suit for specific performance of a contract of sale and in the alternative for pre-emption in respect of the property sold, embraced two distinct causes of action, and that Court fees must be affixed in accordance with the rule laid down in section 17 of the Court-fees Act, the plain object of which was to prevent loss to the revenue by the joinder of separate causes of action in one suit, whether the reliefs sought were alternative or cumulative, the fees to be paid being the same as if separate suits had been filed. The question of jurisdiction was not before the Court. In the 29 Allahabad case it was held that a suit of the same nature as in the P. R. case, except that pre-emption was claimed in respect of a mortgage, embraced two distinct subjects within the meaning

<sup>(1)</sup> (1879) *I. L. R.* 5 Cal. 489.

<sup>(2)</sup> 96 P. R. 1895.

<sup>(3)</sup> (1907) *I. L. R.* 29 All. 155.

<sup>(4)</sup> (1907) *I. L. R.* 30 Mad. 61.



of section 17, and that separate Court-fees were necessary, the claim for pre-emption being a claim to stand in the shoes of the mortgagee, taking over his bond and obtaining possession as mortgagee, and the claim for specific performance being a claim in respect of the proprietary interest in the land.

Here again no question of jurisdiction was involved.

In the 30 Madras case the suit was for redemption of a mortgage for Rs. 3,000 and in the alternative, for recovery of sums, aggregating more than Rs. 2,000, on the basis of a mortgage to be executed by the plaintiff to the defendants in accordance with provisions contained in the mortgage for Rs. 3,000. The judgment ran : " The alternative claims, therefore, " are distinct matters which could have been made the grounds of " separate suits and it would, therefore, seem to be reasonable to " hold that they are ' distinct subjects ' within the meaning " of section 17. It follows, therefore, that the value of the suit " for purposes of Court-fees is more than Rs. 5,000 and " consequently also for purposes of jurisdiction."

In the 5 Calcutta case the Court held that " the law " regarding jurisdiction to try a suit or appeal as determined " by the value of the subject-matter involved..... is quite " irrespective of the value for purposes of assessing the Court- " fee payable on the plaint or petition of appeal, which, for " the sake of convenience, is fixed by certain rules which " determine an artificial value for purposes of the stamp reve- " nue. The value of the subject-matter of a suit or appeal, on " which depends the jurisdiction of the several grades of Civil " Courts, is the actual value of the property in litigation."

In the present case the relief sought was—

(a) a declaration that a house shown in violet on the plan filed was the plaintiff's property and that its sale to defendant No. 2 was null and void ; (b) a declaration that the plaintiff was owner of the houses shown in red on the plan, by virtue of a previous sale in his favour, or a decree for specific performance of the contract of sale ; or (c) a decree for possession by pre-emption of the houses shown in red, on payment of Rs. 600, or such amount as the Court deemed reasonable.

The first relief was valued at Rs. 150, the second at Rs. 600, and the third in the alternative at Rs. 600—

As above stated the value of the houses claimed, violet and red, admittedly did not exceed Rs. 900.

The Madras Court recorded no reasons for the final sentence cited "and consequently also for purposes of jurisdiction," but the *dictum* was possibly based on section 8 of the Suits Valuation Act, or on the general rule that the value for Court-fee governs the value for jurisdiction.

That rule cannot, however, in our opinion, be applied to cases in which separate reliefs, no one of which exceeds the value of the property in suit, are claimed in the alternative in respect of that property.

As pointed out in the P. R. case cited, the object of section 17 of the Court-fees Act is to prevent loss to the revenue, and the Suits Valuation Act contains no rule corresponding to section 17. The houses in suit being of a value which does not confer the right of further appeal, that right does not in our opinion accrue merely by reason of separate claims, not exceeding that value, being sought in one suit.

The utmost that the plaintiff could obtain was possession of the houses, and the plaint did not ask for any more valuable relief.

The houses were the property in litigation and we accept the rule laid down in the Calcutta case that the actual value of those houses is the value of the appeal.

For these reasons we hold that a further appeal does not lie. The appeal was however admitted in the alternative under section 70 (1), (b) of the Courts Act.

The reliefs sought were not, in our opinion, inconsistent. The plaintiff might well have been ignorant of the actual subject-matter of the sale by his father, whether the houses shown in red only or those shown in red and in violet, and the subject of the sale to the plaintiff would naturally be limited in his mind, to what he understood to have been sold by his father.

It was found by the lower Appellate Court that all that had been sold by the plaintiff's father was included in the contract of sale to the plaintiff, and the fact that the plaintiff honestly thought that he already owned part of the houses and purchased only the remainder, does not exclude the applicability of section 27 of the Specific Relief Act.

On the findings of fact below, including notice to the appellant of prior sale to the plaintiff, the decree passed must be maintained.

Although the sale-deed in favour of the appellant was executed on the 1st July, he paid nothing until compulsory registration on the 15th October, and his only out-of-pocket expenses were Rs. 9 for the paper on which the deed was executed.

These facts considered with others specified by the lower Appellate Court, justify the inference that the appellant had notice, and section 27 (b) of the Specific Relief Act does not help him.

The cross-objections have, in our opinion, no force. The lower Appellate Court had discretion in the matter of costs, and in this appeal under section 70 (1) (b) we see no reason for interference with its exercise of that discretion.

The appeal fails and is dismissed with costs. The cross-objections also are dismissed.

*Appeal dismissed.*

### Privy Council.

No. 42.

*Present.*

*Lord Robertson.*

*Lord Atkinson.*

*Lord Collins.*

*Sir Andrew Scoble.*

*Sir Arthur Wilson.*

ATAR SINGH AND OTHERS,—(DEFENDANTS)—APPELLANTS.

*Versus*

THAKAR SINGH,—(PLAINTIFF)—RESPONDENT.

*Hindu law—Alienation by father—Ancestral and self-acquired property—onus of proof—suit to set aside alienation as being made without legal necessity—conjecture and positive proof.*

In a suit to set aside a deed of sale of immoveable property executed by the plaintiff's father, who had succeeded to it as the next reversionary heir on the death of the widow of the last male owner, the plaintiff alleged that the land sold was ancestral property, and that the alienation had been made without legal necessity and was therefore void.

The evidence showed that the last male-owner had acquired some lands in the district by purchase and others on abandonment by collateral relatives, but there was no evidence defining the boundaries of these portions respectively, that being merely a matter of conjecture.



*Held* that, the *onus* of proving that the property alienated was not self-acquired in the hands of the last male-owner, was on the plaintiff, who could not under the circumstances derive any assistance from conjectures, however reasonable in place of positive proof.

*Appeal from a decree of the Chief Court Punjab (Hon Mr. Justice Anderson and Hon. Mr. Justice Robertson), dated 26th May 1903.*

De Gruyther, K. C., for appellants.

Nemo, for respondents.

The facts of the case sufficiently appear from the judgment of the Chief Court delivered by :

26th May 1903.

ROBERTSON, J.—This is a somewhat peculiar case.

The facts are set forth in the judgment of the lower Court. Briefly, it appears that one Dyal Singh, father of the plaintiffs, was the next reversioner to the property of one Dhanna Singh, whose widows were in possession of the property for life. Dyal Singh appears to have been of extravagant and somewhat dissolute habits and to have been in pecuniary difficulties. The widow of Dhanna Singh had made various alienations during her lifetime of Dhanna Singh's property, and it appears to have occurred, or to have been suggested, to Dyal Singh that he might successfully contest these alienations. He was, it is said, not in a position to bring suits unaided, and so he entered into two agreements, one with Man Singh, Kharak Singh and Harnam Singh, defendants, and one with Babu Atar Singh, brother to, the three just named, pleader of the Chief Court, who agreed to furnish the necessary funds and conduct the cases on certain terms which we shall presently discuss. As the result of the litigation embarked on, consisting mainly of a suit to set aside a gift made by Dhanna Singh's widow, Mussammat Rajind Kaur, to one Gurdit Singh, the alleged daughter's son of Dhanna Singh, that suit was successful and the land so obtained, with other lands which had been given up by Mussammat Khem Kaur in consideration of a payment of Rs. 3,100—after the decision against Gurdit Singh, is dealt with in a deed of sale. The two agreements mentioned above were executed on the same day, 27th October 1891 and the deed of sale on 7th May 1894. By the deed of sale, Dyal Singh made over 37—64 of the land acquired by the suit, which 37—64 is valued by the parties at Rs. 28,643-12-0 the consideration for the sale being no money payment at the time, but the services rendered in accordance with the agreements of 27th October 1891, which services are valued at Rs. 28,643-12-0.

The plaintiff, who is a little minor boy, sues through his mother as next friend, alleging the alienation to have been made for a fictitious price, without any legal necessity, and with a view to prejudice plaintiff's rights, the property is alleged to be ancestral, and it is claimed that Dyal Singh had no power by custom to make the alienation without valid necessity in presence of the plaintiff.

It was contended for the defence that the property was not ancestral, that Dyal Singh had full power to alienate, and that the alienation was made in payment for services which conferred great benefit on plaintiff, and was for valid consideration and legal necessity. It was also urged that plaintiff, not having been born at the time of the alienation, could not sue. Two issues were first drawn (1) was the property ancestral? (2) if it was, was the alienation for full consideration and necessity, and are plaintiffs bound by the agreement of 27th October 1891, and was that agreement for the benefit of plaintiff and defendant 3 (Dyal Singh). Further issues were drawn as to the date of Thakur plaintiff's birth and his power to sue, if born subsequent to the alienation.

The lower Court found that Thakur was born before 7th May 1894 and, for the reasons given by the lower Court and from a consideration of the evidence on the record, we have no doubt that this decision is correct, and we find accordingly that Thakur was born before 7th May 1894.

The next point to consider is, whether or not the property was ancestral, and whether Thakur has any *locus standi* to sue. It was suggested in general terms that the conditions of the agreements are so monstrous that the question of *locus standi* is in some remote way affected by the fact, but no serious ground was put forward upon which it would be possible to admit that the plaintiff has any *locus standi* or could obtain the relief sought unless it be held that the property is ancestral. However unfair the agreements may be, and however much one of them may or may not be open to animadversion, we are clear that unless the property be held to be ancestral the suit must fail. We, therefore, proceed at once to what is the main point in the case, and what has been the crucial point throughout, *i. e.*, is the property in suit "ancestral" in whole or in part in the sense in which that term is understood under the customary law. "Ancestral property" for the purposes of this suit means property which was held by an ancestor who is the common ancestor of the parties. In this case, therefore,

it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh.

Extracts from the remarks recorded on the pedigree-tables of Mauza Tungbala of the Settlement Records of 1865 and 1892-93 are on the record and are printed at pages 14 and 13 of the paper-book.

There appears to be no doubt that the village was originally founded by a Tung Jat who was the common ancestor of the defendants Dyal Singh and Dhanna Singh. In the pedigree-table prepared at Settlement, Dyal Singh and Dhanna Singh are shown as descended from one Harji. No doubt in the Sikh times the stronger members of a family got more than their shares, and we find from the remarks recorded in 1892-93 that the entire land had practically come into the hands of Dhanna Singh. Lands given up by other co-sharers and coming to Dhanna Singh in virtue of his relationship and of the fact that the land had been held by a common ancestor of the absconder, and Dhanna Singh would *clearly* be held to be ancestral. Some portions may have been derived from other proprietors of their holdings only by purchase or simple acquisition in their absence, but the main portions would appear to have been left by the other Tung relatives to come into Dhanna Singh's hands. It is noted in the pedigree-table that "most of the co-sharers of the village being in straitened circumstances absconded or absented themselves. Out of the proprietary body Sardar Dhanna Singh alone remained in possession of the entire land." It would appear, therefore, clear, that the village had been acquired practically in its entirety by Dhanna Singh in consequence of the abandonment of his relatives and collaterals. In regard to such land it has been laid down in *Natha Singh v. Harnam Singh* <sup>(1)</sup> that it should be considered ancestral. At page 83 of that judgment it is remarked "considering that this was a portion of the family ancestral holding, and fell to Sham Singh owing to its abandonment by a near relative we think that this portion of the estate should be held to be governed as regards alienations, by the same rule as that which applies to that part of the estate which is admittedly ancestral. . . . We think that this particular land is not removed from the category of ancestral property, merely because it came to Sham Singh owing to the abandonment thereof by a near relation rather than by simple inheritance." These principles are in

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(1) 31 P. R. 1894,



no way traversed in the judgment in *Fakir v. Daulat* <sup>(1)</sup> which is by a single Judge, the circumstances in that case being quite different from those in this. We think, therefore, that it must be presumed that the land in Dhanna Singh's hands before the village was evacuated in order that Kanwar Nau Nihal Singh might make a garden of it, must be considered to have been then ancestral. It is impossible to differentiate between the "portions which came from relatives and co-sharers and the portion which may have, in some instances, been purchased.

It appears, however, that Kanwar Nau Nihal Singh "about fifty years ago (*i.e.* about 1842) caused the village to be evacuated "for he intended planting a garden there." These are the words on this point in the pedigree-table of 1892-93. It does not appear how far this intention was ever carried out, or whether the population and evacuation went beyond the village site. It appears that when Sardar Nau Nihal Singh wished to start his garden, Sardar Dhanna Singh started another village site-abadi on the lands of the hunting ground known as Shikargah and that "abadi" remained as the village site of Tungbala the old site, which had been destroyed or depopulated to make room for the garden, being included as *nazul* property in Amritsar. It does not appear whether Sardar Nau Nihal Singh ever intended to, or ever did, make the cultivated lands of Tungbala which would have made a very large garden. The word used in connection with the garden is "tamir" which suggests the idea that a walled and enclosed garden was intended. The idea was not carried out, but the new abadi for Tungbala which Dhanna Singh had started remained as the abadi of Tungbala and the old one was incorporated in Amritsar. It does not appear, whether or not Dhanna Singh was ever dispossessed of any part of the culturable lands; if he was, apparently, they were almost immediately restored intact. Some neighbouring villages, were destroyed entirely to make the hunting ground of Maharaja Kharak Singh, but this was not the case with Tungbala, and we are quite unable to find from the record that there was any such confiscation and break of ownership in regard to Tungbala as would bring the case within the purview of the ruling in *Ram Nundun Singh v. Janki Kaur* <sup>(2)</sup> Even if the land was taken up by Sardar Nau Nihal Singh, for a short period, which is by no means established, it appears to have been restored intact, and there was no such break of continuity as to deprive the property of its ancestral character. We hold, therefore,

(1) 51 P. B. 1901.

(2) (1902) I. L. R., 29 Cal. 829, P. C.

on a full consideration of all the facts disclosed by the record, that that part of the property must be classed as ancestral.

This being so, Thakur Singh clearly had the necessary *locus standi* to contest the alienation, and it can only be maintained in so far as it may be found to be for necessity, as regards the interest of the plaintiff. As regards Dyal Singh himself, of course, the matter appears to be at an end.

[The remainder of the judgment is not required for the purposes of this report.]

The judgment of their Lordships was delivered by Lord Collins :—

16th July 1908.

This is an appeal from a decree of the Chief Court of the Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakur Singh and his brother, Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on the 7th May 1884 by their father Dyal Singh to the appellants and certain other persons as purchasers, on the ground that the lands, the subject-matter of the sale, were in the view of the Hindu law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiffs' father Dyal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. Kehr Singh died while the suit was pending. The only question in dispute on this appeal is whether the lands were ancestral. The District Judge has held that they were not, the Chief Court has reversed his decision and held that they were.

It is not disputed that the *onus* on this issue is on the plaintiffs, and it is because in the opinion of the District Judge they failed to discharge this *onus* that the suit was dismissed.

It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu law. Therefore, if the plaintiffs cannot show that they were not self-acquired lands in the hands of Dhanna Singh, the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the district by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons, who may have been collateral, and, in that way, may have become

possessed of lands which, by the custom of the Panjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land respectively. Indeed, the learned Judges of the Chief Court themselves say : "It is impossible to differentiate between the portions which "came from relatives and co-sharers and the portions which may "have, in some instances, been purchased." But it is by reason of this impossibility that the plaintiffs failed to prove their case. The learned District Judge also points out that, since the death of Dhanna Singh, large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively self-acquired lands. Their Lordships agree that, when the *onus* lies, as it does in this case, on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the Judges of the Chief Court, their Lordships venture to think that they have hardly given sufficient weight to this consideration. Their Lordships agree with the conclusion and reasoning of the learned District Judge, and will humbly advise His Majesty that the Appeal be allowed and the decree of the Chief Court set aside with costs. The respondent must pay the costs of this appeal, except so far as they may have been increased by the delay which has taken place in the prosecution of the appeal.

Appeal allowed. Solicitors for the appellants—Watkins and Lempriere.

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### No. 43.

*Before Hon. Mr. Justice Rattigan, and Hon. Mr.*

*Justice Shah Din.*

ABDUL ALI—(PLAINTIFF)—APPELLANT,

*Versus*

MR. F. VON GOLDSTIEN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 362 of 1908.

*Indian Contract Act IX of 1872, Section 230 (3) —Personal liability of Agent in British India for money due to a contractor for work done for a Sa a outside British India.—Limitation—Indian Limitation Act, XV of 1877, Article 56, and Section 19, explanation (1)—Acknowledgment by Agent.*



*Held*, that plaintiff suing for the balance of money due to him for work done for a Rana in his State situate outside British India was entitled under section 230 (3) of the Indian Contract Act, IX of 1872, to sue the defendant, the Rana's Agent (*qua* the work) in British India from whom plaintiff had actually got the contract.

*Semble*, that article 56 of the Second Schedule of the Indian Limitation Act is applicable to such a suit.

*Held further* that a letter addressed to the Rana by the defendants within 3 years from the date of the completion of the work by the plaintiff was a sufficient acknowledgment of liability in respect of the plaintiff's claim within the meaning of explanation (1) to section 19 of the Indian Limitation Act, as it admits in clear and definite language that plaintiff has a good and subsisting claim.

*First appeal from the decree of W. de M. Malan, Esquire, District Judge, Simla, dated the 17th December 1907.*

Muhammad Shafi, for appellant.

Fazl-i-Hussain and Pir Bakhsb, for respondent.

The judgment of the Court was delivered by :—

15th March 1909.

RATTIGAN, J.—The plaintiff, Abdul Ali, is a contractor of Simla, and he sues defendant, Felix Von Goldstien, who is also a contractor of Simla, upon the following allegations, *viz.* —

1. That during the years 1899 to 1901 he performed, by agreement, certain building work for the defendant at Kiar in Koti State.

2. That the work was finished in February 1901, and its total value then due and payable amounted to Rs. 5,874-14-11, of which the plaintiff has been paid Rs. 2,000 only.

3. That on the plaintiff's frequent demands for the balance, the defendant finally denied personal liability and told plaintiff that it was the Rana of Koti, and not defendant, who was liable.

4. That the defendant frequently stated in reply to plaintiff's demands, "when the Rana pays me, I will pay you," and in the year 1904 the defendant told the plaintiff that he had settled with the Rana, and would pay the plaintiff when the money came. This reply was stated at intervals until June or July of this year.

5. That upon an enquiry being ordered by the Superintendent of the Hill States about the year 1903, concerning the liability of the Rana of Koti for the debt due to the plaintiff, the matter went before the Local Government and it was decided after a period of two years or thereabouts that it was the defendant and not the Rana who was liable.

6. That plaintiff again demanded the monies due with interest, but the defendant refused to pay.

7. That the contract with the defendant was made at Simla, where both parties reside.

8. That the plaintiff is entitled to interest at Rs. 12 per cent. by way of damages from March 1901 to the present day, amounting to Rs. 2,576-14-0.

The plaintiff, therefore, prays for a decree against the defendant for Rs. 3,874-14-11, principal, and Rs. 2,576-14-0, interest thereon at Rs. 6 per cent. until realization, and costs of the suit, or such other relief as this Court may deem fit and proper.

The plaint was presented, through plaintiff's Advocate, Mr. Bevan Petman, to the District Judge, Simla, on the 18th September 1906. In reply to plaintiff's claim, defendant filed a written statement to the following effect :—

1. That the plaintiff has no cause of action against the defendant.

2. That the suit is barred by limitation.

3. That the plaintiff did not perform any work for the defendant, nor was there any agreement between the parties.

4. That the plaintiff did certain work for the Rana Sahib of Koti, at Kiar, during the period mentioned in paragraph No. 2 of the plaint and received certain sums of money. The defendant was only supervising the work of contractors on behalf of the Rana.

5. That paragraphs Nos. 3 and 4 of the plaint are denied. The defendant never promised or admitted any personal liability.

6. That no such decision was given by the Local Government, as alleged in paragraph No. 5, of the plaint, but even if so, it is not legally binding on the defendant.

7. That the plaintiff applied to the Local Government to grant him permission to sue the Rana Sahib of Koti, his application was rejected, therefore, he has filed this suit against the defendant.

8. That paragraph No. 7 of the plaint is denied.

9. That the plaintiff is not entitled to any relief whatsoever against the defendant his suit may be dismissed with costs.

The learned counsel, who appeared respectively for the plaintiff and the defendant, suggested certain issues which the Court accepted. They were as follows:—

“ 1. Has plaintiff any cause of action against defendant? *Onus* on plaintiff.

“ 2. Is the suit barred by limitation? *Onus* on defendant.

“ 3. What, if any, was the contractual relationship between the parties? *Onus* on parties.

“ 4. Did defendant at any time admit personal liability? *Onus* on plaintiff.

“ 5. To what relief, if any, is the plaintiff entitled? *Onus* on plaintiff.”

After a somewhat prolonged trial, the District Judge, who has dealt with the case with patience and care, held (1) that there was no sufficient proof that defendant originally engaged plaintiff on his own responsibility; (2) that defendant had received a sum of Rs. 7,000 from the Rana of Koti for the work done on the palace built for the latter; (3) that out of this amount defendant was legally bound to pay over to plaintiff, a sum which should represent the latter's proportionate share; (4) that in addition to plaintiff, defendant himself and another contractor, one Mamu, were entitled to share in the sum of Rs. 7000-0-0, and (5) that plaintiff was approximately entitled to Rs. 1,500-0-0 as his share. He further found that as regards plaintiff's claim to share in this sum of Rs. 7,000, the suit was within time under article 62 of the Limitation Act, as defendant did not receive the last instalment from the Rana till September 1907, i.e., after the institution of the suit.

The District Judge accordingly granted plaintiff a decree for Rs. 1,500-0-0 with costs in proportion, and interest at 6 per cent. per annum from date of decree to date of realization.

This decision satisfied neither party and the result is that both plaintiff and defendant have filed cross-appeals to this Court, plaintiff contending that his claim should have been decreed in full; while defendant urges that the District Judge has given plaintiff a decree upon a ground not put forward by the plaintiff or involved in the plaint and pleadings, and also that plaintiff's suit, as framed and as based on an alleged contract, is barred under article 56 of the Limitation Act.



In this judgment we will dispose of both appeals together, as the questions involved are necessarily very closely connected.

The case was argued before us at very considerable length and with great ability on both sides, but the points, which we have to decide are really very simple. Briefly stated, they are as follows :—

1. Has plaintiff proved any contractual relationship between himself and defendant of the kind alleged in the plaint ?

2. If so, is his claim within time ? The third question relates to defendant's cross-appeal, and arises only if the answer to the above two questions, or to either of them, is in the negative, and, as in our opinion, the first two questions must be answered in the affirmative, it is obviously unnecessary for us to say anything further on the third.

To revert then to the first question. It is an admitted fact that plaintiff's connection with the re-building of the Rana's palace was due to defendant, and it is not denied that he actually performed the work specified in the annexure to the plaint. Nor is there any contention as to the rates charged by him. The sole question upon this point is, whether his claim lies against the defendant or against the Rana of Koti. Plaintiff has sworn, and defendant does not attempt to deny, that the defendant was entrusted by the Rana with the matter of the building of the palace, though the parties are at issue as to the exact nature of defendant's position in the business. Plaintiff, on the one hand, maintains that defendant was either given a contract by the Rana to build the palace, in which case his (plaintiff's) position would be merely that of a sub-contractor under defendant, or was authorised by the Rana to act as his agent in getting contractors to do the work. In either case plaintiff contends that he can sue defendant for the work done. Of course, if plaintiff was employed merely as a sub-contractor under defendant, the latter's liability can admit of no doubt. This is conceded. But if plaintiff cannot establish this fact, the question still remains whether under section 230 of the Indian Contract Act, the plaintiff's claim will lie against defendant, if it can be shown that the latter was acting as the agent of the Rana. In our opinion, the first contention must fail, for there is nothing on the record to show that the Rana gave a definite contract to defendant, and that the latter, on his own responsibility, made a sub-contract with the plaintiff. But there is, we think, ample

ground for holding that defendant in this matter was acting as the agent in British India of a foreign principal. Defendant maintains that he was employed by the Rana—or rather that he gave his services to the Rana gratuitously—as a mere supervisor of the work, and that all parties thoroughly recognised this and were well aware that he had nothing more to do with it than to bring the contractors and the Rana face to face and to thereafter superintend the conduct of the building operations. We have very carefully considered the arguments of Mr. Fazl-i-Hussain in this connection and also the evidence, oral and documentary, on the record, and the conclusion at which we have arrived is that defendant was in fact the agent of the Rana and acted as such in these proceedings. It is not, so far as we know, the duty of a mere supervisor of work to select the contractor who is to do the work, and we see no reason whatever to doubt the truth of plaintiffs' statement when he swears that he took this contract from defendant. Everything points to the fact that both plaintiff and defendant recognised that the latter was the duly authorised agent of the Rana in this affair. All plaintiff's bills were submitted to the Rana through the defendant; all monies which were paid, were paid, from time to time, to plaintiff through the defendant; in the correspondence on the file, defendant practically admits that he was doing the work through contractors; and finally defendant went out of his way to do his best to get the Rana to pay the contractors, or, failing that, to settle with them through him. We need not refer in detail to this correspondence as Exhibit P. 14, dated 7th January 1904, is sufficient for the purpose. This was a letter addressed by defendant to the Rana, and in it defendant admits that he has received two notices from the contractors demanding payment of money, and he informs the Rana that he holds the latter responsible for the amount which the contractors have demanded from him. It is clear from this that the contractors looked to defendant for payment for work done by them, and that defendant did not then repudiate his liability to them. Furthermore, he of his own accord, informed the Rana that he would settle all claims if the sum of Rs. 7,000 was sent to him, and in his receipt for this amount (Exhibit P. 2, dated 24th May 1903) he says that the money has been received by him in "final settlement of work done at Kiar." The defendant in his evidence has also admitted that he wrote to the Rana threatening to stop work "if we

“were not better treated.” He says he did so at the request of the contractor, but even if such was the case, it is obvious that the contractors, in making the request, regarded him as the Rana’s agent and intermediary.

Then we have the evidence of the Rana himself, taken on Commission. The Rana swears positively that he gave the work of building his palace to Mr. Goldstein, that Mr. Goldstein was responsible, and that all monies were accordingly paid to him from time to time; and that he gave no contract himself to the plaintiff. Finally, we might refer to the letter written by Mr. Garoud (defendant’s manager) to the Deputy Conservator of Forests on the 2nd October 1901, in which defendant assumes all responsibility as regards the contractors’ claims.

Mr. Fazl-i-Hussain relied upon certain correspondence and statements by the plaintiff which go to show that plaintiff endeavoured to get his money direct from the Rana. No doubt at one time plaintiff did so, but we have no hesitation in accepting Mr. Shafi’s explanation that in so doing he was acting upon the suggestion of the defendant. The work had undoubtedly been done for the Rana, and plaintiff was well aware that the defendant was acting merely as the Rana’s agent. It is scarcely surprising, therefore, to find that he tried, in the first instance, to get his money from the principal debtor, but this was in all probability at defendant’s suggestion, and in any case, we cannot see that he is thereby debarred from suing for its recovery from the agent when he finds that he cannot recover it from the Rana. The Local Government has refused to allow a suit to be brought against the Rana, and without the permission of the Local Government, no suit will lie against the latter. This being the case, plaintiff is, we think, entitled in law to claim the benefit of section 230 (3) of the Indian Contract Act, and to sue the agent through whom the contract was made. Whether, therefore, the defendant be regarded as the contractor in this case, or as the agent of the Rana, the plaintiff, who was brought into the business by him, is clearly entitled to look to him for payment for work admittedly done. We are ourselves of opinion that defendant was acting merely as the Rana’s agent in this matter; but in either event he is legally responsible to the plaintiff. It is hard, of course, upon him that he should be compelled to pay when the person, who has benefitted, es-



capas all liability, but it would be even more inequitable that plaintiff's claim should entirely fail.

Weighed in the balance plaintiff's claim is weightier than is that of the defendant, and even from an equitable point of view it is only right that if one or other of two more or less innocent persons is to suffer, the burden should fall upon defendant, who induced plaintiff to undertake this business. In saying this, we look at things from the point of view of equity. From a strictly legal point of view, it is, we think, obvious that plaintiff has in the circumstances a good cause of action against defendant, who acted throughout this business as the agent of the Rana.

The next question is, whether upon the view which we take, the present claim is barred by limitation. Mr. Fazl-i-Hussain, in his very able argument on behalf of defendant, contended that any claim, grounded on a contract enforceable against defendant by virtue of the provisions of section 230 (3) of the Contract Act, must be barred under article 56 of the Limitation Act, inasmuch as it was an admitted fact that plaintiff's work under any such contract was completed in February 1901, whereas the present suit was not instituted till September 1906. Mr. Shafi, in reply to this argument, urges (1), that article 56 of the Limitation Act has no application to the case of an agent who is sued under section 230 (3) of the Contract Act, inasmuch as in such a case the work, though done at the request of the defendant, is not done for the defendant; and (2), that in any event there are, on the record, sufficient acknowledgments by defendant of his liability to keep the claim alive. Upon the first point we need give no definite opinion, though we are, as at present advised, inclined to think that in a case of this kind article 56 is as applicable to the agent at whose request, and practically for whom, the work is done, as it would be to the person for whose benefit the work was actually done. But be this as it may, we certainly think that Mr. Shafi's second contention must prevail. The work was completed in February 1901, but, on the 7th January 1904 (*i.e.*, within three years from the date of the completion of the work done by plaintiff), the defendant addressed Exhibit P. 14 to the Rana of Koti, and in this document defendant admits that he has received a notice from plaintiff for work done at Kiar, and adds, "I agreed, in May 1903, to settle all claims made by the above contractors for

“ the sum of Rs. 7,000-0-0 but as I have not yet received  
 “ any payment towards the above amount which was as arranged  
 “ to be paid up within the year in gradual instalments, I  
 “ now hold you responsible for the amount the con-  
 “ tractors have given notice for, and give you this month  
 “ to settle up in. I gave you every facility for settlement,  
 “ but you did not take it, and you must, therefore, pay up  
 “ in full.” From this letter it is clear that defendant admits  
 that the contractors (including plaintiff) have a good claim  
 against him for the sums respectively due to them, and the  
 letter is, in our opinion, a good acknowledgment of plain-  
 tiff's claim within the meaning of explanation (1) to sec-  
 tion 19 of the Limitation Act. It does not, in so many  
 words, specify the amount due to plaintiff, nor was it ad-  
 dressed to plaintiff, but it does, in clear and definite language,  
 admit that plaintiff has a good and subsisting claim, and  
 for the purposes of section 19 of the Act this is enough  
 (see *inter alia*, *Narayana Ayyar v. Venkataramana Ayyar* (1),  
*Gopee Kishen Goshami v. Brindabun Chunder Sircar Chowdhry* (2),  
*Sukhamoni Chowdhurani v. Ishan Chunder Roy* (3), *Mani Ram Seth*  
*v. Seth Rup Chand* (4), *Ram Rakha v. Karam Chand* (5). In all  
 such cases all that is necessary is, that the document signed by  
 the defendant should admit that the latter is under an existing  
 liability to the plaintiff. *Ittappan Kuthiravattat Nayer*  
*Avergal v. Nanu Sastri* (6). In the present case Exhibit P. 14  
 fulfils all these requirements, for it is apparent from its tenor  
 that defendant admits that plaintiff has a valid claim for  
 work done, and it is on this ground that he urges the Rana to  
 pay up the money in full.

The suit was brought within three years of the date of this  
 letter, and consequently, even if article 56 applies (as we think  
 it does) to the claim, the suit is within time.

Mr. Fazl-i-Hussain, with reference to this part of the case,  
 argued that it was not stated in the plaint that the claim was  
 within limitation by reason of defendant's alleged acknowledg-  
 ments, and he referred us to the provisions of section  
 50 of the Civil Procedure Code of 1882, and of Order  
 7, Rule 6, of the present Code. We do not think that  
 this argument has much force, for even if the plaint is to be  
 construed with strictness, it is clear from paragraph 4 that

(1) (1902) *I. L. R.* 25 *Mad.* 220, *F. B.* (4) (1906) *I. L. R.* 33 *Cal.* 1047 *P. C.*

(2) (1869-70) *XIII M. I. A.* 37. (5) 97 *P. R.* 1884.

(3) (1898) *I. L. R.* 25 *Cal.* 844 *P. C.* (6) (1903) *I. L. R.* 26 *Mad.* 34.

plaintiff did intend to rely upon defendant's acknowledgments of liability, and especially upon defendant's action in 1904.

We hold, therefore (1), that plaintiff is entitled to sue defendant under section 230 (3) of the Contract Act, and (2), that the claim is not barred by limitation. Upon these findings it is obviously unnecessary for us to deal with defendant's cross-appeal, which, upon the view taken by us, must necessarily fail as plaintiff succeeds *in toto*.

We, accordingly, accept plaintiff's appeal and decree the full amount claimed by him, with costs throughout against defendant. We further direct that plaintiff shall be entitled to interest on the said sum of Rs. 6,451-12-11 at the rate of 6 per cent. per annum from the date of suit until realization.

Defendant's cross-appeal is dismissed with costs.

*Appeal accepted.*

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### No. 44.

*Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.*

BAGGA AND OTHERS—PETITIONERS,

*Versus*

SALIHON AND OTHERS—RESPONDENTS

Civil Miscellaneous No. 216 of 1909.

*Civil Procedure Code, (1908) Act V of 1908, Order XLV, rule 7—Appeal to Privy Council—extension of time for the deposit of security for Respondents' costs sufficient ground for.*

*Held*, following *Barjore and Bhawani Pershad v. Mussammat Bhagana* <sup>(1)</sup> and dissenting from *Ranga Sayi v. Mahalakshamma* <sup>(2)</sup>, that time allowed for the deposit of security for Respondents' costs under order XLV, rule 7, of the Code of Civil Procedure, 1908, for appeal to Privy Council can be extended for cogent reasons and that poverty was sufficient reason for extension of time where the sum of money required was large and the diligence of the Petitioner was shown by his having paid in  $\frac{2}{3}$ th of the money required within the time originally allowed :—

*Application for extension of time within which to deposit security on account of Respondents' costs.*

The order of the Court was delivered by :—

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<sup>(1)</sup> (1883-5) L. R. 11 I. A. 7 S. C. (1884) I. L. R. 10 Cal. 557.

<sup>(2)</sup> (1891) I. L. R. 14 Mad. 391.



JOHNSTONE, J.—On 18th February we issued an order granting the petitioner his certificate of leave to appeal to the Privy Council. The certificate bears the date 22nd February. Petitioner was directed to pay in Rs. 4,016 under, rule 7, order 45, Civil Procedure Code. On 7th April the petitioner paid in Rs. 3,116, that being the day which the office reports, and which was probably notified to petitioner, as the last day for deposit. But on the 4th April 1910, 3 days before expiry of the time allowed, he applied for extension on the ground of poverty. 15th April 1910.

We have considered the question whether poverty is sufficient cause for extension of time. In *Ranga Sayi v. Mahalakshamma* (1) a Division Bench, following a previous ruling by a Division Bench, which interpreted the Privy Council decision in *Barjor and Bhawani Pershad v. Mussammatt Bhagana*, (2), it was laid down that time could be enlarged in these cases only for "cogent" reasons, and that those reasons must be such as would lead the Court to believe that the party was diligent in due time to be prepared to lodge the deposit within the limited period, and that he was prevented from doing so, not owing to absence and the difficulty of getting funds, but owing to some circumstance, accidental or otherwise, over which he had no control, or owing to mistake which the Court would consider not unreasonable or caused by negligence.

In the present case the sum of money required was large and the diligence of the petitioner is shewn by his having paid in  $\frac{3}{4}$ th of the money required. In our opinion the reason given for non-payment of the rest within due date is a sufficient reason. The rule laid down by the Madras High Court is a mere gloss upon the Privy Council ruling quoted, and in our opinion it is not a necessary consequence of that ruling. Their Lordships seem to us merely to recognise that time can be extended for "cogent" reasons: all the rest is merely the view of the Madras Judges, by which we are not bound and from which we venture to dissent.

The prayer is that time be extended to 5th May 1910, and we grant that prayer.

Let petitioner be informed.

*Petition allowed.*

(1) (1891) *I. L. R.* 14 *Mad.* 391.

(2) (1883-5) *L. R.* 11 *I. A.* 7 *S. C.* (1884) *I. L. R.* 10 *Cal.* 557.

## Privy Council.

No 45.

*Present :**Lord Macnaghten.**Lord Atkinson.**Lord Collins.**Lord Shaw.**Sir Arthur Wilson.*

THE OFFICIAL ASSIGNEE, BOMBAY,—APPELLANT,

*Versus*THE REGISTRAR, SMALL CAUSE COURT, AMRITSAR—  
RESPONDENT.

*Administration of Insolvents estate—Punjab Laws Act, IV of 1872, section 27, Imperial Act of Parliament 11, and 12, Vict. C. 21, Conflict of Jurisdiction between two Courts having Insolvency Jurisdiction—Proceedings under Punjab Laws Act—Vesting order under Imperial Act, effect of —*

On 12th December 1906 a firm of traders carrying on their business at Amritsar and other places, in the Punjab and also at Bombay were, on the application of a creditor declared, insolvent by the Insolvency Court, Amritsar, and a Receiver of their property was appointed on the same date under section 27 of the Punjab Laws Act. On 31st May 1907, certain other creditors applied to the Bombay High Court in its Insolvency Jurisdiction praying that the said traders be adjudicated Insolvent under 11 and 12, Vict C. 21. This application was granted and at the same time a vesting order, vesting the property of the insolvents in the official assignee, was passed. On this the Official Assignee applied to the Amritsar Insolvency Court to abstain from realizing the property of the insolvents and asked that the property be made over to him. This was refused on the ground that the property in the Punjab had vested in a Receiver, appointed by the Court, and that there was, therefore, no property in the Punjab upon which the subsequent vesting order of the Bombay High Court could take effect. This order was confirmed by the Chief Court on revision, on the ground that the property vested in the Court itself, though not in the receiver. On appeal by the Official Assignee to the Privy Council—

*Held*, that under section 27 of the Punjab Laws Act, 1872, what is entrusted to the Punjab Court is merely administration, and that under that Act no transfer of property takes place

*Held also*, that under the Imperial Act 11 and 12 Vict. C. 21 when an adjudication is made by the High Court the estate of the Insolvent vests in the Official Assignee, and he is the person to administer it.

*Appeal from the order of the Chief Court of the Punjab (Hon. Sir William Clark, C.J., and Hon. Mr. Justice Chevis, J.) dated 5th May 1908.*

The facts of the case sufficiently appear from the judgment of the Chief Courts delivered by:—

SIR WILLIAM CLARK, C. J.—The Judge of the Insolvents Estates Courts, Amritsar, has stated the point for decision as follows:—  
 “The only question is whether on the date on which the vesting order was passed by the Bombay High Court (31st May 1907), there were any rights subsisting in the insolvents as regards their property, moveable and immoveable, throughout the Punjab, which could be dealt with under section 7 of the Insolvent Debtors Act, XI and XII, Victoria Chapter, XXI.”  
 5th May 1908.

The insolvents having been declared insolvents under section 24, Act IV of 1872, and a receiver appointed by the Amritsar Court on the 12th December 1906, the Judge has held that the receiver was appointed under section 351, Civil Procedure Code, and that under section 354, Civil Procedure Code, all the insolvents' property vested in the receiver on the day he was appointed. We are unable to accept this view.

The Judge of the Small Cause Court has jurisdiction in insolvency matters both under Act IV of 1872, and as District Judge under the Civil Procedure Code, but the two jurisdictions cannot be mixed up.

The present proceedings were conducted under Act IV of 1872 and could not have been taken under the Civil Procedure Code, as the condition necessary for institution of insolvency proceedings under that Code did not exist.

All the proceedings in this case, therefore, must be held to be under Act IV of 1872, and sections 351, 354 of the Civil Procedure Code, cannot be applied.

Though we are unable to maintain the Judge's decision on the grounds on which he based the decision yet we think it is right on other grounds.

In our opinion it is an essential element of a declaration of insolvency that the insolvent's property should cease to be the property of the insolvent and become the property of the Court or of some one appointed by the Court for the benefit of the creditors.



We find that is what happens under the Insolvent Debtors in India Act 11 (1848) and 12, Victoria Chapters 21 paragraph 7. The same happens under the English Law of Bankruptcy, 1883, see Baldwin's Law of Bankruptcy, 9th Edition, paragraph 204. "The Court is to adjudge the debtor bankrupt and there-  
"upon the property of the bankrupt will become divisible among  
"his creditors and vest in a trustee." The Civil Procedure Code, sections 351 and 354, lays down the same law, and so does the new Provincial Insolvency Act, III of 1907, sections 16 and 23.

It is true that Act IV of 1872 does not in so many words say that the property of the insolvent vests in the Court, but on a careful consideration we think that that is what is provided by the Act.

Section 24 lays down what constitutes an insolvent and then section 27 lays down: "The property of the insolvent shall be  
"sold or administered, under the direction of the Court, either  
"through the agency of its own officers or of assignees to be ap-  
"pointed by the Court, in the manner most conducive to the  
"interest of the creditors, and the proceeds shall be divided  
"ratably amongst them."

We think that the substantial meaning of this section is that the property was to be treated as if it had vested in the Court for the benefit of the creditors, and provided for its being sold or otherwise administered by the Court. Objection has been taken to the order of the 12th December 1906 making the declaration of insolvency and undoubtedly the order is defective in that it did not pass an order exempting the person and property of the debtor from further legal process section 24 (5), which order attaches to itself the consequence of being "deemed  
"an insolvent."

The order, however, was passed with the consent of the debtors, and complied with the provisions of section 24, as regards furnishing of security, and requiring the debtors to make a statement of their assets and liabilities, and it wound up by appointing the Registrar of the local Small Cause Court receiver.

We have no hesitation in holding that this order, though irregular and incomplete, did, in fact, make the debtors insolvents from the date it was passed, and that the consequences of being insolvents attached to that order, one of which was that the property of the debtors vested in the Court.

We have referred to rules made under section 31 of the Act, but they do not help us in interpreting the wording of the Act on the point before us. *Kunhaya Lall v. Harsukh Rai* <sup>(1)</sup> has also been referred to, but it only lays down with reference to the necessity of the official assignee being impleaded in a suit against the insolvent, that the law casts no representative character upon him, and the Act and rule throw the duty on the Court of taking charge of the estate. The decision does not help in any way towards the elucidation of the point before us.

The rulings quoted to show that prior attachment confers no title *Frederick Peacock v. Madan Gopal* <sup>(2)</sup>, *Kristnasawmy Mudaliar v. Official Assignee of Madras* and others <sup>(3)</sup> have no relevancy in our view of the case that the property of the insolvents was vested in the Court, and there was no property of the insolvents left on which the order of the Bombay High Court could operate.

The insolvents' place of business was Amritsar. The great bulk of their creditors live there as in other parts of the Punjab; they were by consent declared insolvent in the Amritsar Court on 12th December 1906, and then they or a few of their creditors endeavour by an order of 31st May 1907 of the Bombay High Court to have the insolvency conducted in the Bombay High Court. The case seems somewhat similar to *Re Aranvayal Sabha Pathy Moodliar* <sup>(4)</sup>.

We think that the Judge rightly dismissed the application of the official assignee, Bombay, and we dismiss the revision with costs.

*Revision rejected.*

The judgment of their Lordships was delivered by Sir Arthur Wilson.

This is an appeal against a judgment of the Chief Court of the Punjab, which affirmed that of the Insolvent Estates Court, Amritsar. The controversy involved in the appeal relates to an alleged conflict of jurisdiction between two Courts, both having insolvency jurisdiction, but jurisdiction created by different legislative authority and different in its local extent.

<sup>(1)</sup> 48 P. R. 1874.

<sup>(2)</sup> (1902) I. L. R. 29 Cal. 428, F. B.

<sup>(3)</sup> (1903) I. L. R. 26 Mad. 673.

<sup>(4)</sup> (1887) I. L. R. 21 Bom. 297.

Under the Imperial Act of Parliament, 11 and 12 Vict. C. 21, relating to insolvency proceedings before what are now the High Courts in the Presidency Towns in India, jurisdiction is conferred upon those Courts extending, for the present purpose, over the whole of India, and for many purposes over much wider limits.

Under the Punjab Laws Act, IV of 1872, in a series of sections beginning with section 22, the Punjab Legislature has created a system of insolvency of its own, but, of course, such an Act can be effective only within the ambit of the jurisdiction of the Legislature which passed it. These are the two systems of insolvent administration which have to be considered in disposing of the present appeal, and have, if possible, to be reconciled.

There is, indeed, a third system in India, created by yet another legislative authority—namely, the Legislature of India, embodied in Chapter 20 of the Civil Procedure Code. This last-mentioned system need not be further alluded to; for their Lordships are of opinion that the learned Judges of the Chief Court were right in considering that it had no application to the circumstances of the present case.

The facts of the present case are simple. The debtors were a firm of traders who carried on business at Amritsar and other places in the Punjab, and also at Bombay and elsewhere. On the 3rd December 1906, the Amritsar Insolvency Court, on the application of a creditor, ordered a notice to issue calling upon the debtors to show cause why they should not be declared insolvent, and attaching their property in the Punjab. On the 12th December, in the presence of four out of the five members of the debtor firm, another order was made declaring them insolvent, and requiring them to furnish security, and to put in lists of property, creditors and debtors.

On the 31st May, 1907, certain other creditors applied to the High Court at Bombay, in its insolvency jurisdiction, against all the members of the debtor firm, praying that they might be adjudicated insolvent under 11 and 12 Vict. C. 12. An order was made accordingly, and at the same time a vesting order, vesting the property of the debtors in the Official Assignee of Bombay.

The Official Assignee, who is the appellant here, applied to the Insolvent Court at Amritsar to abstain from realizing the property of the debtors, and asked that that property should be made over to him. The Amritsar Court refused the application, holding that the property of the debtors in the Punjab had vested



in a receiver appointed by the Court, and that therefore there was no property of the debtors in the Punjab upon which the subsequent vesting order made by the Bombay Court could take effect.

Against this refusal there was an appeal to the Chief Court, and that Court held that the Amritsar Court was wrong in saying that the property in the Punjab was vested in the receiver, but held further that the Order appealed against was right on the ground that the property in question was by law vested in the Court, and therefore could not pass under the subsequent vesting order of the Bombay Court.

The facts which have been stated are those which appear to their Lordships material for the present appeal, which is brought against the order of the Chief Court.

It is clear that under the insolvency system established by the Imperial Act, the High Court of Bombay, if unimpeded by any other Court, can effectually administer the estate of an insolvent in such a case as the present.

The question raised upon this appeal is, whether proceedings under the Punjab Act control the powers of the Bombay Court.

It would be matter for regret if the powers of one Court to administer an estate completely were restrained by those of another Court which can only do so locally and partially. But it appears to their Lordships that no such inconvenience necessarily arises.

Under the Imperial Act, 11 and 12 Vict., C. 21, when an adjudication is made by the Court which is now the High Court of Bombay the estate of the debtor vests in the Official Assignee and he is to administer it. What has been held by the Chief Court is, that in the present case, that law did not apply to property in the Punjab which had belonged to the debtors concerned, because the property had, before the date of the vesting order of the Bombay Court, been transferred under the Punjab Act, already referred to, to the Punjab Court. The question therefore is, whether the Chief Court was right in holding that the property in the Punjab had vested in that Court, so as to exclude the operation of the Bombay vesting order.

Their Lordships are unable to agree with the learned Judges of the Chief Court.

The section of the Punjab Laws Act on which the power of the Punjab Court depends for the present purposes, is as follows:—

Section 27 says :

“The property of the insolvent shall be sold or administered under the direction of the Court, either through the agency of its own officers or of assignees to be appointed by the Court, in the manner most conducive to the interest of the creditors, and the proceeds shall be divided ratably amongst them.”

It appears to their Lordships to be clear that under the Punjab Act, what is entrusted to the Punjab Court is merely administration, and that under that Act no transfer of property takes place.

Their Lordships regret they have to deal with this question in an appeal heard *ex parte*. The difficulty thus arising is diminished, however, by the fact that the question is purely one of law.

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed, and the judgments of the Chief Court of the Punjab and of the Insolvent Estates Court, Amritsar, set aside with costs in both Courts, and in lieu thereof it should be declared that the property of the insolvents in the Punjab is vested in the Official Assignee, Bombay.

The costs of this appeal are to be taxed as between solicitor and client and paid out of the insolvents' estate.

*Appeal allowed.*

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**No. 46.**

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Chevis.*

MR. W. E. FLEMING OF SIMLA—PLAINTIFF,

*Versus*

THE MUNICIPAL COMMITTEE OF SIMLA—DEFENDANT.

Civil Reference No. 15 of 1910.

*Punjab Municipal Act XX of 1891, section 42 (1) (A) (a) (i)—gross annual rent includes house tax payable by tenant to landlord.*

*Held*, that when Municipal taxes on a house at Simla payable by the landlord, are, by contract between landlord and tenant, payable by the latter to the former as part of the consideration for occupation

the sum so payable must be included in assessing the gross annual rent or annual value, on which the Municipal Committee is entitled to levy a house tax under section 42 (1) (A) (a) (i) of the Punjab Municipal Act, 1891, irrespective of the terms in which that sum is described in the contract.

*Case referred by the Honorable Mr. A. Meredith, Commissioner and Superintendent, Delhi Division, under section 52 of the Punjab Municipal Act, 1891—with his No. 22 L. F., dated the 25th February 1910.*

W. E. Fleming, plaintiff, in person.

Beechey, for defendant.

The order of the Court was delivered by —

SIR ARTHUR READ, C. J.—This is a reference by the Commis- 9th April 1910.  
sioner of Delhi under section 52 (2) of the Punjab Municipal Act, XX of 1891.

The question referred is whether, when Municipal taxes are paid by the tenant to the landlord (of a house at Simla), they should be considered as forming part of the gross annual rent or annual value, on which the Municipal Committee is entitled to levy a house-tax of 10 per cent. under section 42 (1) (A) (a) (i) of the Act. The reference is, as a fact, limited to house and ground-tax. Annual value was defined in section 39 (2) of the Punjab Municipal Act, XIII of 1884, as meaning the gross annual rent for which buildings and lands liable to taxation may reasonably be expected to let, and in the case of houses, may be expected to let unfurnished. This definition has been maintained in section 42 (2) of the present Act, XX of 1891.

Section 63 of the Act provides that a tax payable under section 42 (1) (A) (a) (a tax on buildings and lands) shall be paid by the owner of the property in respect of which it is payable; and that a tax payable under section 44 (a water-tax) shall be paid by the occupier of the property in respect of which it is payable.

32 and 33, Vict. C. 67 (The Valuation (Metropolis) Act, 1869), section 4, defined the term "gross value" as meaning the annual rent which a tenant may reasonably be expected, taking one year with another, to pay for an hereditament if the tenant undertook to pay all usual tenant's rates and taxes and to the commutation rent charge, if any, and if the landlord undertook to bear the cost of the repairs and insurance, and the other expenses, if any, necessary to maintain the hereditament in a state to command that rent.



In *Pullen v. St. Saviour's Union*, <sup>(1)</sup> the facts dealt with were that the owner of a block of artisans' dwellings, consisting of separate tenements, the access to which was by means of a common stair, let the tenements upon the terms of the tenants paying a certain weekly sum by way of rent, and also a further sum for the lighting and cleaning of the common stair. The overseers, in assessing value, included the further sum in the rent. Darling, J., said: "What we have to determine is the value to the landlord upon which the premises are rateable . . . What would the tenant be expected to pay here upon these conditions? It seems to me that he would be expected to pay the whole of what he in fact pays directly to the landlord and also that he pays indirectly to him through his collector." (For lighting and cleaning the common stair) . . . "For no tenant would take a tenement in a building of this character unless the staircase by which he has to reach his tenement is kept reasonably clean and lighted . . . Therefore I think that these sums represent the basis upon which the gross value of the premises is to be computed."

Channel, J., said: "I think that the weekly sum of 6d. (for lighting and cleaning the stair) is not a sum which, upon the facts of this case, could be distrained for, and, according to the bargain between the parties, is no part of the rent; at the same time I think that it is a sum which must be taken into consideration in arriving at the rent which a tenant might reasonably be expected to pay for one of these tenements . . . It does not signify that in a bargain, which is in fact made between the parties, the landlord chooses to split up the sum to be paid by the tenant, and say that he shall pay as much for the tenement itself and an additional sum for keeping the access to it in order." The appeal against the assessment on the whole amount paid was consequently dismissed. The Commissioner, who referred the question to this Court, has cited: "The wording used on the reverse of form 1 of the declaration under section 18 of the Income Tax Act, paragraph (6)" as indicating "that taxes are not included in rent for the purpose of the Income-tax Act." The reference is apparently to page 115 of the Punjab Income-tax Manual of 1899, (c) (i) and (ii), which provide for the deduction from gross receipts, in the case of income from houses, of any rent paid on account of such houses, and of

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(<sup>1</sup>) (1900) L. R. 1 Q. B. 139.

Municipal taxes on houses, buildings and land. This does not, in our opinion, help the objector—sums paid for Municipal taxes are expressly excluded from the amount on which income-tax is payable, but the Municipal Act contains no similar provision, and we must interpret the Act as it stands. The owner has to pay 10 per cent. on the annual value, *i.e.*, on the gross annual sum for which his house may reasonably be expected to let.

The Q. B. case cited is authority for holding that the total sum payable by the tenant to the owner for use and occupation of the house is the annual value, and that it is immaterial that out of the sum of Rs. 1,000, the sum of Rs. 900 is treated as the rent of the house and the sum of Rs. 100 is treated as recouping the owner for the house-tax payable by him to the Municipality.

The water-tax is obviously on a different footing and is payable by the occupier, not by the owner as such. The occupier would suffer for failure to pay the water-tax and the owner would suffer for failure to pay the house-tax. Section 64 applies to the latter case and section 201 to the former.

Previous practice has nothing to do with the question before us, which is merely of interpretation, but we may say that 10 per cent. is the maximum amount chargeable, and reduction of the amount is within the discretion of the Municipal Committee and the Local Government. The objector filed a number of objections, all based on previous practice or hypothetical cases of hardship.

The matter is in the hands of owners and occupiers, and is merely a case of supply and demand. If an owner cannot find a tenant willing to pay what he demands, he either accepts a smaller sum or has his house on his hands.

We have no hesitation in holding that a sum of Rs. 1,000, payable under the contract between owner and occupier by the latter to the former for use and occupation of a house for a year, is the annual value on which house-tax is recoverable, whether the sum was described in the contract as rent or as Rs. 900 rent and Rs. 100 for the house-tax payable by the owner on Rs. 1,000.

Our answer to the question referred is therefore in the affirmative. Parties will bear their own costs of this Court.

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## No. 47.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

AMRU AND SARMUKE SINGH—(DEFENDANTS)—  
APPELLANTS,

*Versus*

MOHAN SINGH AND ANOTHER— (PLAINTIFFS) AND DESA SINGH AND OTHERS— (DEFENDANTS)—	}	RESPONDENTS.
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Civil Appeal No. 539 of 1909.

*Custom—adoption—Adoption of brother's daughter's son without the consent of adopter's reversioners—Validity of—Hindu Jat agriculturists of Hoshiarpur Tahsil—onus probandi.*

*Held*, that among Hindu Jat agriculturists of the Hoshiarpur tahsil of the Hoshiarpur district adoption of a brother's daughter's son is not valid without the consent of adopter's reversioners.

*Held also*, that the rule laid down in *Ralla and others v. Budha* <sup>(1)</sup> is that among agriculturists the onus of establishing the unfettered power to adopt a person who is not an agnate is on the party who sets up the power, and that evidence of power to adopt a daughter's son does not shift the burden of establishing the power to adopt the son of a brother's daughter.

*Further appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 30th November 1908.*

Gurcharan Singh, for appellants.

Muhammad Shafi, for respondents.

The judgment of the learned Judge was as follows :—

28th March 1910.

SIR ARTHUR REID, C. J.—The sole question for decision is whether, among Hindu Jat agriculturists of the Hoshiarpur tahsil of the Hoshiarpur district, adoption of a brother's daughter's son is valid without the consent of the reversioners of the adopter. The authorities cited are—

(1). *Bhupa v. Uttam Singh*, <sup>(2)</sup> in which it was held that “according to the general custom in the Punjab “an adoption of a daughter's son was found to be “valid among the Jat caste,” and that the mere circumstance that no instance of an adoption of the kind in the particular got in question (Khewal Jats of the Ludhiana district) had been



adduced was not sufficient to establish affirmatively that the custom of the *got* differed from the general custom so as to render the adoption invalid.

(2). *Albel Singh v. Vir Singh*, <sup>(1)</sup> in which it was held on the evidence, including instances of adoption of sister's son, that the plaintiff had failed to discharge the burden which lay on him of establishing the invalidity among Siddhu Barar Jats of the Moga *tahsil*, Ferozepore, of a brother's daughter's son.

(3). *Hukam Singh v. Mangal Singh*, <sup>(2)</sup> in which it was held that *Bhupa v. Uttam Singh* <sup>(3)</sup> was sufficient authority for holding that the mere absence of cases in the *got* in question (Tung Jats of the Amritsar district), was "not adequate reason for considering that the custom of adoption did not prevail among them," the judgment was very short and included the passage "so too among these Jat clans the burden of proving a daughter's son or an only son cannot be adopted, would rest on the plaintiffs and they have not discharged it."

(4). *Balla v. Budha*, <sup>(4)</sup> in which it was held, the parties being Muhammadan Arains of the Nawashahr *tahsil*, Jullundur, that the burden of proving the validity, without the consent of near reversioners, of the adoption of a daughter's son was on those who set up the adoption. The judgment of Plowden, S. J., ran: "In Hosbiarpur, in the *Riwaj-i-am* of Jats, Hindu and Muhammadan, for the whole district, it is stated that daughter's and sister's sons may be adopted, but no light is thrown upon the conditions of a valid adoption. . . . There is, however, ample material on which it may be concluded that, among the Hindu land-holding tribes who permit adoption in these portions of the Punjab, there is no presumption of the validity of the adoption of a daughter's son by custom, irrespective of assent of the agnates. . . . I think therefore that we are fully warranted in holding generally—creed, tribe and locality apart—that when a sonless man, in any land-holding group which recognises a power to adopt, asserts that he is competent to adopt a daughter's son or other non-agnate in presence of near agnates, irrespective of their assent, the presumption at the outset is against the power; and, in the absence of any admission in the pleadings

(1) 86 P. R. 1885.

(2) 61 P. R. 1890.

(3) 43 P. R. 1886.

(4) 50 P. R. 1893, F. B.

“in any particular case which may qualify the presumption, the form of the issue should be such as to throw the burden of proof on the person asserting the existence of the unqualified power.” The Court eventually held that the *onus* had not been discharged.

(5). *Natha Singh v. Sujan Singh*, (1) in which it was held, on the *Riwaj-i-am* and instances cited and evidence of assent by some reversioners, that among Lehl Jats of the Hoshiarpur district adoption of a daughter's son was valid without the assent of reversioners.

(6). *Sohnun v. Ram Dial*, (2) in which it was held that Acharjya Brahmans of the Kangra district, who were not agriculturists, were not bound by the rule of burden of proof laid down in *Ralla v. Budha* (3), and that under Hindu Law an adoption by one of them of his sister's son, in the *duttaka* form, was valid without the assent of reversiners (first cousins).

(7). *Hem Raj v. Sahiba*, (4) in which it was held that, among Hindu Jats of the Hoshiarpur district, the *Riwaj-i-am* which stated that if a mam had no male lineal descendants, he could adopt his daughter's son and recorded four instances of adoption of a daughter's son, shifted the burden of proof on to the party who denied the validity of such adoption.

(8). *Chuttan v. Ram Chand*, (5) in which it was held that *Ralla v. Budha* (3) did not apply to non-agricultural Brahmans of the Delhi suburbs, and that, adoption admittedly prevailing among them, the *onus* of proving that a particular kind of adoption, e. g., of a daughter's or a sister's son was not valid, was on the party who denied the validity, and it was further held, citing *Hukam Singh v. Mangal Singh* (6) and *Albel Singh v. Vir Singh* (7) that under the circumstances a brother's daughter might be regarded in the same light as a man's own daughter.

(9). *Ilahia v. Qasim*, (8) in which it was held that a custom among Arains of the Jullundar *tahsil* empowering a sonless proprietor to give his ancestral estate to his sister's son, of another *got*, in the presence of male agnates had not been established, that sister's sons were “on quite a different footing

(1) 34 P. R. 1899.

(2) 79 P. R. 1901.

(3) 50 P. R. 1893, F. B.

(4) 116 P. R. 1901.

(5) 86 P. R. 1904.

(6) 43 P. R. 1886.

(7) 86 P. R. 1885.

(8) 24 P. R. 1905.

“from daughter's sons and that the *onus* lay on the donor  
“to prove the validity of the custom.”

(10) *Achhar Singh v. Mehtab Singh* (1) in which it was held (1) that the *Riwaj-i-am* of the Hoshiarpur district and instances cited imposed on the party denying the right of adopting a daughter's son in the presence of collaterals the burden of proving that it did not exist, and (2) that the burden had not been discharged.

(11). *Hamira v. Ram Singh* (2) in which it was held that the principle that widows succeeded not as mothers of their deceased sons but as widows of their sons' fathers could not be followed up to all its logical conclusions, as, for instance, placing a paternal aunt and a grand paternal aunt in the position occupied by daughters. The judgment ran: “In no system of law  
“that we are aware of are the claims of daughters and sisters  
“placed on the same footing, and we cannot imagine that the  
“agriculturists of this Province by a subtle train of reasoning  
“would ever have put them on the same footing.” One instance only of adoption of a brother's daughter's son in this district has been cited and that was maintained by the District Court in 1879.. The Full Bench ruling was specifically followed in *Sohnun v. Ram Dial* (3) and though it has been attacked by Counsel in *Hem Raj v. Sahiba* (4) and in other cases and after taking time for delivery of judgment, I see no reason for a further reference to a Full Bench on the ground that it does not correctly lay down the law. The rule laid down by it is that among agriculturists the burden of establishing the unfettered power to adopt a person who is not an agnate is on the party who sets up the power to adopt the individual in question, and that evidence of power to adopt a daughter's son does not shift the burden of establishing the power to adopt the son of a brother's daughter.

On the rulings the one class of cognate differs widely from the other, and the burden of proof has not been discharged by the one instance cited, the decision having been prior to the F. B. decision and the *Riwaj-i-am* being silent on the power contended for here. For these reasons I dismiss the appeal with costs. I see no reason for a remand, the appellant having had ample opportunity of adducing evidence.

*Appeal dismissed.*

(1) 81 P. R. 1907.

(2) 134 P. R. 1907, F. B.

(3) 79 P. R. 1901.

(4) 116 P. R. 1901.



## No. 48.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

BAHADUR ALI—APPELLANT.

*Versus*

MUSSAMMAT BIVI—RESPONDENT.

Civil Appeal No. 1095 of 1909.

*Guardian and Wards Act, VIII of 1890, section 7 (3)—Muhammadan Law—appointment of guardian by will—right of maternal grandmother.*

*Held*, that under Muhammadan law the father of a girl who has not attained the age of puberty is not her lawful guardian in the presence of her maternal grandmother, and is not entitled to appoint a guardian by his will in supersession of the grandmother, and that a guardian so appointed is not a guardian appointed by will within the terms of section 7 (3) of the Guardian and Wards Act, 1890.

*Miscellaneous Appeal from the order of A. H. Brasher, Esquire, District Judge, Jhelum, dated the 26th July 1909.*

Muhammad Shafi, for appellant.

Ishwar Das, for respondent.

The judgment of the learned Judge was as follows :—

28th March 1910.

SIR ARTHUR REID, C. J.—The facts are stated in the judgment of the Lower Court.

It appears that Mussammat Nek Bakht, the custody of whose person is in dispute, is under 15 years of age and has not attained puberty, being admittedly not more than six years of age in January 1909, and consequently, under Muhammadan Law, the respondent, her maternal grandmother, would have been entitled to custody of her person in preference to the girl's father, had he been alive.

He would, therefore, not be entitled to appoint a guardian by his will in supersession of the grandmother, before the infant outgrows the latter's guardianship, and the guardian whom he purported to appoint by will would not be a guardian appointed by will, within the terms of section 7 (3) of the Guardian and Wards Act, VIII of 1890, paragraphs DLXVI, DLXVII and DLXX, *Shama Charan's Muhammadan Law, Vol. I*, are in point.

It cannot be contended that a man in the street, a complete stranger, could affect an infant by executing a will purporting to appoint a guardian of that infant's person, and a person who

is not a lawful guardian obviously, cannot appoint a guardian. This disposes of the plea in appeal that the testamentary guardian is the first guardian, and the case does not proceed up to the point at which the provisions of section 39 have to be considered.

The maternal grandmother is entitled to the custody granted to her and the appeal fails and is dismissed with costs.

*Appeal dismissed.*

### No. 49.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

AMIR—(DEFENDANT)—APPELLANT,

*Versus*

MUSSAMMAT SHARF NUR—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 975 of 1909.

*Custom—Succession—Barren widow claiming a definite share in her husband's estate along with his son by another wife—Mughals of tahsil Rawalpindi.*

*Held*, under the *Riwaj-i-am* of Rawalpindi District which in the absence of evidence throwing doubt on its correctness should be followed, that among Mughals of Badia Qadir Bakhsh, *tahsil* Rawalpindi a barren widow is entitled to a definite portion of her husband's estate for life by way of maintenance in the presence of his son by another wife.

*Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 23rd June 1909.*

Gobind Das, for appellant.

Fazal-i-Elahi, for respondent.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The first question for decision is, 22nd April 1910 whether the widow's second marriage relied on as a bar to her claim to the property in suit, has been established. I concur in the reasons recorded by the learned Divisional Judge for holding that the defendant-appellant signally failed to discharge the burden of proving this marriage. As pointed out by the Divisional Judge, a secret marriage is set up, and evidence of an openly celebrated marriage is adduced. The question of custom has also, in my opinion been correctly, decided by the learned Divisional Judge. At page 46 of the Customary Law of the Rawalpindi District prepared at the Settlement of 1885-86 Mughals are recorded as stating that where there are a

barren widow and sons by another widow, the former is entitled to half the property of the deceased, and the sons to the other half. (This, of course, is for the widow's life only.)

In *Kahna v. Wazira* <sup>(1)</sup> an entry in a *Riwaj-i-am* was followed in the absence of evidence throwing doubt on its correctness.

In *Hem Raj v. Sahiba* <sup>(2)</sup> and *Sheran v. Mussammot Sharman* <sup>(3)</sup> it was held that the initial *onus* of establishing a custom opposed to the general custom was discharged by an entry in the *Riwaj i-am* which shifted the burden of proof.

In *Sher Jhang v. Ghulam Mohi-ud-din* <sup>(4)</sup> the dictum in *Ramji Lal v. Tej Ram* <sup>(5)</sup> to the same effect was approved, and it was held that entries in the *Riwaj-i-am* had a value of their own as expressing public opinion *ante litem motam*. The three instances, occurring in 1893, 1900 and 1904, the two last in this very village, strongly corroborate the record in the compiled Customary Law, and the plea that the widow's claims were not contested and that minor sons could not object, has little force.

The only authorities cited for the appellants are paragraph 16 of Rattigan's Digest, in which the general rule is stated to be that widow's ordinarily take maintenance only where there are male descendants, whether by the widow claiming or by another; *Sher Khan v. Mussammot Biri* <sup>(6)</sup> in which it was held that a *Chauhan Rajput* widow of the Rawalpindi District could not, by custom, claim a definite share of her husband's estate in the presence of his sons by another wife, but was entitled to a definite portion of the estate for her life, for her maintenance; and *Elahi Bakhsh v. Khewni* <sup>(7)</sup> in which it was held that among *Arains* of the Ludhiana District a record in the *Riwaj-i-am* of the instance of a widow's right to share with her step-sons could not be accepted in the face of specific authority to the contrary. In the 1905 case the Court did what the Lower Appellate Court has done in this case, although it held, in the absence of specific instances in support of the *Riwaj-i-am*, that the widow could not claim any specific share, and the 1906 case is not in point, there being no specific authority against the *Riwaj-i-am* here.

(1) 68 P. R. 1893.

(2) 116 P. R. 1901.

(3) 117 P. R. 1901.

(4) 22 P. R. 1904, F. B.

(5) 73 P. R. 1895, F. B.

(6) 30 P. R. 1905.

(7) 116 P. R. 1906



The land decreed to the respondent has not been decreed out and out, but merely for her life, in lieu of maintenance; and I see no reason for holding that the area decreed, 67 *kanals* 11½ *marlas*, half the deceased husband's estate, is excessive.

The plea that the Lower Appellate Court should have given the appellant an opportunity of adducing further evidence has no force. Ample opportunity was given. The appeal fails and is dismissed with costs.

*Appeal rejected.*

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**No. 50.**

*Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.*

MUSSAMMAT AISHA BIBI—(DEFENDANT)—APPELLANT,

*Versus*

AZIZ-UD-DIN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 60 of 1909.

*Custom—Succession—Succession of widowed daughter-in-law in presence of near collateral—Onus of proving a special family custom—Quraishis of Ferozepore city.*

*Held*, that the defendant on whom the *onus* lay had failed to prove that among the Quraishis of Ferozepore City a widowed daughter-in-law succeeds to the property of her father-in-law in the presence of a near male collateral of the latter. No special family custom excluding the operation of Muhammadan Law was proved in this case.

*Further Appeal from the decree of Q. Q. Henriques, Esquire, Additional Divisional Judge, Ferozepore Division, dated the 19th November 1908.*

Muhammad Shafi, for appellant.

Jowala Parshad, for respondent.

The judgment of the Court was delivered by—

SHAH DIN, J.—The parties in this case are Quraishis of the city of Ferozepore. The property in dispute is 183 *kanals* and 12 *marlas* of land attached to well Qazianwala, situate in *manza* Ferozepore, consisting of 155 *kanals* and 3 *marlas* of proprietary land and 28 *kanals* and 7 *marlas* of occupancy land. This area was owned by one Maulvi Sharf-ud-din, on whose death in 1903 it was mutated in favour of his widowed daughter-in-law, Mussammat Aisha Bibi, defendant No. 1, whose husband, Muhammad Din, had pre-deceased the said Maulvi Sharaf Din. The plaintiff Aziz Din, who is

28th April 1910.

related to Sharf Din in the fourth degree, has brought the suit out of which the present appeal has arisen for possession of the whole of the land specified above by right of inheritance, on the ground that he, as the nearest collateral of Sharf Din, is entitled to succeed to the land in question which was ancestral in the hands of Sharf Din, and that Mussammat Aisha Bibi, defendant No. 1, whose husband pre-deceased his father has no right of succession thereto. Defendant No. 1 pleaded that the land in suit was not ancestral *qua* the plaintiff, and that though the plaintiff was the nearest collateral of the deceased Sharf Din, she (defendant No. 1) was, under a special family custom by which the parties were governed, entitled to exclude the plaintiff from succession to that land.

On the pleadings of the parties the First Court framed three issues, of which the second issue relating to the alleged existence of the special custom set up by defendant No. 1 was the most important. Upon those issues the Court held (1) that the land in suit was not proved to be the ancestral property of Sharf Din so far as the plaintiff was concerned, and (2), that defendant No. 1 had succeeded in proving a special custom under which she, as the widow of the pre-deceased son of Sharf Din, was entitled to succeed to the property left by the latter to the exclusion of the plaintiff.

On appeal the learned Additional Divisional Judge held that defendant No. 1 had failed to prove the special custom set up by her, and that it was not shewn that in matters of succession the parties were governed by any custom at variance with their personal law; and being of opinion that they were governed by Muhammadan Law, he decreed the plaintiff's claim in full.

Before us the question whether the parties are governed by custom or by Muhammadan Law has been discussed at some length on both sides; and after giving our best consideration to the arguments advanced and to the evidence on the record, we agree with the Lower Appellate Court in holding that it is not proved that in matters of inheritance the parties are governed by custom and not by Muhammadan Law. The parties are, as we have said above, Quraishis of the city of Ferozepore, and the land in suit is also situated in that city. The plaintiff expressly stated in his plaint that the parties were not agriculturists, and this was not denied by defendant No. 1 in her pleas. Then we have a statement on the record made by the defendant's pleader on the 3rd March 1908 in which

he admitted that the parties were generally governed by Muhammadan Law, but he went on to say that the defendant was entitled to succeed to the land in suit under a special family custom. That statement is one of great importance as showing that the defendant took her stand, not on general custom, but upon a special custom applicable to the family, while conceding that, generally speaking, the family was governed by personal law. Regard being had to the parties' tribe and to the pleadings in the case, we think that the First Court was justified in imposing on the defendant the *onus* of proving a special family custom in modification of her personal law in regard to her right of succession to the property in dispute. The material question in the case, therefore, is whether the defendant has succeeded in discharging that *onus*.

The oral evidence produced by the parties is, we consider, not of much value. The defendant produced five witnesses, of whom two were Quraishis, two Sayeds and one Moghul by caste. The Quraishi witnesses could give no instance in point; and in fact it has been admitted in this case that there is no such instance of succession among the Quraishis as would help the defendant. One of the Sayad witnesses, Khirshaid Hussain, and the Moghul witness, Murad Beg, give one instance each of widowed daughter-in-law having succeeded to a life estate in her father-in-law's property; and a copy of the mutation order, dated the 29th November 1905, has been relied on to show that in the family of Khair Muhammad Chishti, a similar instance of succession has occurred. Obviously, however, these three instances, none of which relates to the parties' tribe, have very little bearing on the point before us and are insufficient to prove the special family custom set up by the defendant. Of the plaintiff's own witnesses, no less than three, who are men of some respectability—a Sayad, a Sheikh, and an Arain—give evidence in favour of the defendant as to the existence of the alleged custom under which she seeks to succeed; but such oral testimony, apart from specific instances of succession, is of little help in a case of this kind.

The *Riwaj-i-am* of 1882, which has been referred to in argument, relates to Chishtis and Bodlas, and not to Quraishis, and it only lays down the rule as to a widow's succession to a life estate on the death of her husband; and for obvious reasons it has no evidential value for the purposes of the present case. On the other hand, in a contested case—*Mussammat Fatima versus Mussammat Fateh Bibi*—which arose out of a disputed



succession to the estate of one Ghulam Muhammad, a member of the parties' family, it was decided as far back as 1882 after full enquiry that the family was governed by Muhammadan law in matters of inheritance. This judicial precedent, relating as it does to this very family, is of special significance in this case and greatly strengthens the plaintiff's position.

Of the published decisions of this Court, there are no less than five which show that Quraishis residing in different parts of the province are governed in matters of alienation and inheritance by Muhammadan law and not by custom.

We refer to *Ahmad Din v. Mussammat Fazlan* <sup>(1)</sup> (Quraishis of Wazirabad); *Mussammat Karam Bibi v. Hussain Bakhsh* <sup>(2)</sup>, (Quraishis of Gujranwala); *Ghulam Shah v. Zain Shah* <sup>(3)</sup>, (Quraishis of Bhora); *Jowahir Singh v. Yaqub Shah* <sup>(4)</sup>, (Quraishis of Pind Dadan Khan tahsil); and *Mussammat Bukht Bano v. Ohiragh Shah* <sup>(5)</sup>, (Quraishis of Gujar Khan tahsil).

Mr. Muhammad Shafi for the defendant relied on two rulings of this Court, viz. *Mussammat Ghulam Fatima v. Mussammat Maqsudan* <sup>(6)</sup> and C. A. No. 682 of 1899 to show that in some parts of the province Quraishis are governed by custom and not by Muhammadan law. In the first-mentioned case, however, the question whether the parties were governed by custom or by Muhammadan law, did not arise, as it was admitted that for the purposes of that case the parties were governed by custom (page 185 of the Report). In the second case the learned Judge's remark that "we can safely presume that these people, though Quraishis, living as they do in a village in the Gurdaspur District, follow general agricultural custom in such matters as the estate taken by the daughter of a sonless proprietor. Until the case was argued before us, Muhammadan law was never invoked, nor has any practice or usage been brought to light tending to shew that that law was in force."

Those remarks serve at once to distinguish the present case from the decision in question, which does not in our opinion in the least help the defendant.

Upon a review of the circumstances of the case considered in the light of the parties' pleadings and of the evidence on the record, we have no hesitation in holding that the defendant

(1) 175 P. R. 1883.

(2) 92 P. R. 1901.

(3) 101 P. R. 1902.

(4) 5 P. R. 1906.

(5) 45 P. R. 1908.

(6) 69 P. R. 1890.

has failed to prove the special custom set up by her ; and we think that in the absence of proof of such special custom, Muhammadan law must govern the case. Under that law the plaintiff is admittedly entitled to succeed to the proprietary land left by Sharaf Din in preference to the defendant, and as regards that land therefore the appeal fails and is hereby dismissed.

As regards the occupancy land, however, the case stands on a different footing. The Lower Appellate Court apparently overlooked the fact that succession to occupancy land is governed by the provisions of section 59 of the Punjab Tenancy Act and not by custom applicable to the parties or by their personal law. The first court has found that the plaintiff has not proved that the land in suit including the occupancy land, was ever held by Jan Muhammad, the common ancestor of the plaintiff, and Sharaf Din deceased, and we see no reason to differ from that finding. Such being the case, under section 59 of the Punjab Tenancy Act the plaintiff has no right to succeed to the occupancy land aforesaid, and his suit in respect of that land has been decreed on erroneous grounds.

We, therefore, accept this appeal so far as it relates to the occupancy land in dispute, *viz.*, 28 kanals, 7 marlas, and vary the decree of the Lower Appellate Court so as to dismiss the plaintiff's suit as regards that land. As each party has succeeded in part, we direct that each bear its own costs throughout.

*Appeal accepted.*

**No. 51.**

*Before Hon. Mr. Justice Johnstone.*

**FAZIL—(PLAINTIFF)—APPELLANT,**

*Versus*

**SADAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.**

**Civil Appeal No. 1232 of 1909.**

*Custom Alienation—Unrestricted power of a male proprietor to alienate ancestral lands without necessity—exception to general rule of the Customary law—Sahu Jats of mauza Dudah Sahu, District Montgomery.*

*Held*, that among Jats generally ancestral land is inalienable in presence of agnates except for necessity but this general rule is not applicable to Sahu Jats of mauza Dudah Sahu, District Montgomery, where the common village bond has been broken by the introduction into the proprietary body of persons of different independent tribes whose lands all intermix and where many uncontested alienations have taken place in the presence of agnatic relations of the alienors.

*Further appeal from the decree of B. H. Bird, Esquire, Divisional Judge, Multan Division, dated the 3rd February 1909.*

Miran Bukhsh, for appellant.

Radha Kishen, for respondents.

The judgment of the learned Judge was as follows :—

4th May 1910.

JOHNSTONE, J.—This petition under clause (b) has been admitted as a further appeal on the question of custom involved. The suit is by a son for a declaration against a sale of ancestral land by his father by registered deed, dated 5th July 1906, the land measuring upwards of 912 kanals and the price being Rs. 2,000. The allegation is that the sale was a fiction and was entered into in order to prejudice plaintiff.

The parties are Sahu Jats of mauza Dudah Sahu, District Montgomery, and it is said that there are very few of this *got* of Jats left. The whole village was once owned by them; but there has been a long series of alienations virtually uncontested and now  $\frac{3}{4}$  of the village is held by members of a large variety of tribes. The *Wajib ul-arz* does not state any restriction upon alienations by male proprietors further than this that the intending seller shall offer the bargain at a reasonable price to a brother or a near collateral and thereafter to the *shurkayan*, before he can sell to an outsider. The first Court considering these circumstances arrived at the conclusions that probably the suit is collusive and that plaintiff's right to object is not made out. It also went into the matter of consideration and "necessity" and found that at most half the purchase-money was for 'necessity.'

The suit having been thus dismissed the learned Divisional Judge, before whom an appeal was instituted, agreed with the first Court that plaintiff had no power to contest his father's act, and so dismissed the appeal without going into the question of consideration and 'necessity.'

The question for this Court is merely one of custom. There is no doubt that among Jats generally ancestral land is inalienable in presence of agnates except for 'necessity;' but section 61, Provisos (2) and (3), Rattigan's Digest, which in my opinion correctly though in somewhat general terms, states the custom, shows that the general rule stated in section 59 does not apply in villages where the common village bond has been broken by the introduction into the proprietary body of persons of different independent tribes, whose lands all intermix, or where many



uncontested alienations have taken place in the presence of agnatic relatives of the alienors. Now these conditions exist in a marked degree in *mauza* Dadah Sahu, and we have also the fact that the *Wajib-ul-arz*, while it prohibits alienation by females, where it comes to the question of alienations by males, merely prescribes a rule of pre-emption; and I therefore fully agree with the Courts below that plaintiff has no leg to stand upon. I also fully agree that the suit is almost certainly *mala-fides* and collusive.

For these reasons I dismiss the appeal with costs.

*Appeal dismissed.*

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No. 52.

*Before Hon. Mr. Justice Rattigan.*

SULTAN AND OTHERS —(DEFENDANTS)—APPELLANTS,

*Versus*

SHER MUHAMMAD AND OTHERS—(PLAINTIFFS)—  
RESPONDENTS.

Civil Reference No. 6 of 1910.

*Jurisdiction of Revenue Courts—Punjab Tenancy Act, XVI of 1887, section 77 (3) (k)—Suit against a co-sharer for share of sale-proceeds of certain trees in a joint holding.*

*Held*, following *Nazam v. Joti Mal* <sup>(1)</sup>, that a suit against a co-sharer for a share in the sale-proceeds of certain trees growing in a joint holding falls under clause (k) of section 77 (3) of the Punjab Tenancy Act, 1887, and that the Revenue Courts alone, therefore, have jurisdiction and that the fact that the defendants deny plaintiffs' title as a co-sharer does not affect the question of jurisdiction.

*Held*, also, following *Ram Jas v. Ralla* <sup>(2)</sup>, that as the Munsif who happens to be also an Assistant Collector, 2nd grade had no jurisdiction to try such suits, the decree should be set aside and plaint be registered in the Court of Assistant Collector, first grade.

*Case referred by Sayad Wali Shah, District Judge, Muzaffargarh, with his No. 449, dated the 17th December 1909.*

The order of the learned Judge was as follows :—

RATTIGAN, J.—Plaintiffs sue to recover a sum of Rs. 49-15-0 from the defendants on the ground that the parties are co-sharers in the holding upon which certain trees were growing; that defendants sold the said trees to third parties but did not

5th March 1910.

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<sup>(1)</sup> 119 P. R., 1894.

<sup>(2)</sup> 25 P. R., 1902.

give plaintiffs their share in the sale-proceeds; and that the sum mentioned represents the share of plaintiffs in the said proceeds.

The suit was tried by a Munsif who happens to be also an Assistant Collector, second grade, but the District Judge is of opinion that the Revenue Courts alone have jurisdiction to deal with the claim as it falls under clause (k) of section 77 (3) of the Punjab Tenancy Act. As an Assistant Collector has no jurisdiction to try such a suit, the District Judge recommends that the decree of the Munsif should be set aside and that the plaint should be registered in the Revenue Court having jurisdiction to deal with the case, *Ram Jus v. Ralla* (1).

In my opinion the District Judge is right in both points. The decision in *Nazam v. Joti Mal* (2), clearly shows that if in that case the real defendants had been the co-sharers, the claim for compensation would have been regarded as falling under clause (k) of section 77 (3) of the Punjab Tenancy Act. In the case before me the defendants are stated in the plaint to be co-sharers, and the mere fact that they themselves deny plaintiffs' title as co-sharer cannot affect the question of jurisdiction.

Following *Ram Jus v. Ralla* (1), I set aside the decree and order that the plaint be registered in the Court of an Assistant Collector of the first grade with territorial jurisdiction.

Costs to be costs in the cause.

### No. 53.

*Before Hon. Mr. Justice Shah Din and Hon. Mr.  
Justice Chevis.*

SHAHAMAD AND OTHERS—(PLAINTIFFS)—APPELLANTS,  
*Versus*

NAURANG AND OTHERS—(DEFENDANTS)—RESPONDENTS.  
Civil Appeal No. 286 of 1908.

*Custom Alienation—Gift by a sonless proprietor to his daughter's sons—  
Validity of Mirali Sials of Kabirwala tahsil, District Multan.*

*Held*, that among Mirali Sials of the Kabirwala tahsil (formerly called Serai Silhu) of the Multan district a gift of ancestral land made by a sonless male proprietor in favour of the sons of a daughter, whose husband was a *khanai* *imad* and a near collateral, is valid.

*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated the 2nd December 1907.*

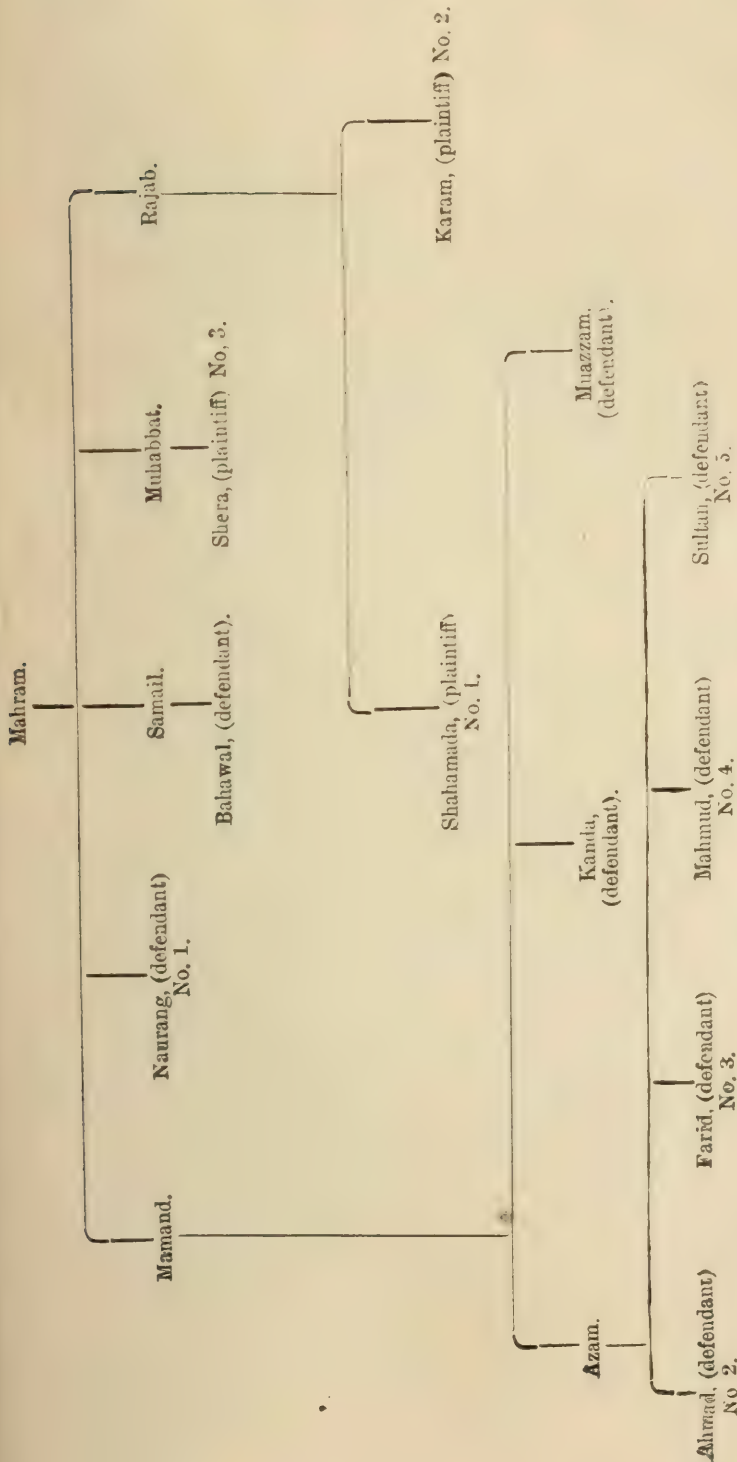
Duni Chand, for appellants.  
Abdul Qadir, for respondents.

(1) 25 P. R., 1909.

(2) 119 P. R., 1894.

The judgment of the Court was delivered by—  
CHEVIS, J.—The geneological tree is as follows :—

28th April 1910.



NOTE.—Naurang's daughter married Azam.



Naurang has made a gift of land to defendants 2-5, who are his daughter's sons, and also his brother's grandsons. Plaintiffs, three nephews of the donor, sue for a declaration to protect their reversionary rights, alleging the gift to be invalid. Bahawal, Kanda and Muazzam are *pro forma* defendants, who have not joined in contesting the gift. It is also to be noted that while the appeal has been pending in this Court a petition, purporting to come from Shahamad, appellant, has been put in signifying his withdrawal from the appeal, but Shahamad has not put in an appearance to attest the withdrawal. The other appellants too have not troubled to appear in person at the hearing of the appeal.

The gift has been upheld by both the lower Courts. Plaintiffs appeal. Plaintiffs say they are governed by Muhammadan law and not by custom. But the parties are agriculturists living in a village, and no reason whatever has been shewn for applying Muhammadan law. The first Court held that custom applied and the point was not taken in the grounds of appeal to the Divisional Court; and the plaintiffs claim that daughters are excluded altogether, which is not according to Muhammadan law.

The defendants uphold the gift on the ground that by the custom of the tribe a gift can be made, especially to a daughter's sons who are also near agnates, and also on the ground that the gift was to the sons of a *khudadamad* who lived with the donor and rendered him services.

The parties are Mirali Sials of the Kabirwala *tahsil* (formerly called Serai Sidhu) of the Multan district. The history of the family as given in exhibit p. 7 shows that the common ancestor Akhbar, Mirali, came from the Jhang district about 175 years ago.

On turning to the Customary law of the Multan district we find the following answers given by Serai Sidhu Muhammadans to various questions.

Answer to Question 12 (page XIX). "If the daughter has married a collateral (*yak jaddi*) of her father, she will succeed to the exclusion of the collaterals and after her, her children will succeed; but if she has not thus married she will not succeed."

Answer to Question 16 (page XXIII). (This question relates to a daughter living with her husband in her father's house).

"If there are brothers, she is entitled to maintenance only;  
 "if there are no brothers, she succeeds if she has married  
 "a descendant of her father's grandfather, otherwise the  
 collaterals succeed."

*Question 41.* "Can a man give away his property if he has no sons?"

*Answer (p. XLII).* "Yes, he can do so."

The *Riwaj-i-am Kaumwar* of the *tahsil* shows that the Mirali Sials also concurred in these answers, and the *Wajib-ul-arz* of this particular village states that answers to questions have been given in the *tahsil Riway-i-am Kaumwar*. These answers are decidedly in favour of the defendants. They sum up to this, (1) that in the presence of a son a daughter, even if living with her husband in her father's house, gets only maintenance, but that in the absence of a son a daughter's right to exclude collaterals depends on her having married a near agnate; (2) that a sonless proprietor can make a gift.

Coming to the instances quoted, we find that the learned Divisional Judge's judgment is somewhat confused. Instances quoted on the two sides have been mixed up, and some instances have been quoted twice. Plaintiffs' counsel relies on the following instances :—

1. Sada's case (see page 10 of the paper-book, line 13). Here both the daughter of Gahna, son of Sada, married cousins, according to the evidence of Inayat (witness, defendant 3) who is brother of Sada, but this witness says that when they married they *refused* to keep the property. But his version of Gahna's property being entered in his daughters' names till they married is opposed to the mutation records which shew that Gahna died in his father's lifetime; when Sada died *Mussammatt Bhagan* was already married and *Mussammatt Sabin*, then unmarried, succeeded to an equal share with her two uncles. Apparently Sabin afterwards married the son of one of these uncles. In the presence of sons of the deceased it seems to have been rather by favour than of right that even an unmarried grand-daughter got a share of Sada's estate.

2. Karam's case (page 10, line 20). This case is proved by Amir, witness, plaintiff 2; or rather he says he *heard* about it. This is a peculiar case. Karam's widow is said to have married her husband's brother, who brought up the daughter of Karam and got her married. In such a case she would probably regard

her step-father in the light of a father and would not seek to take the property from him.

3. Nawab's case (page 10, line 25). This again proves nothing. When Nawab died his son Mutalli succeeded, the daughter being excluded by her brother. On Mutalli's death, his mother succeeded and not the daughter (sister of Mutalli). This is not a case of contest between daughter and collateral.

4. Dilawar's case (page 10, line 30.)

5. Shera's case (page 10, line 32.)

Both Dilawar and Shera are shown as *lawald* in the revenue papers, and so the oral evidence as to these men having left daughters must count as doubtful. And even if we accept the evidence as to the existence of the daughters, we shall have to go further and presume that these daughters married near collaterals before we can regard these cases as in point.

6. Shahamad's case (page 11, line 2). This again proves nothing as Shahamad left sons, so it is not a case of contest between collaterals and daughters.

7. Kasim's case, (page 11, line 44). This again is not in point, being merely a case of a gift by a man with his son's consent.

Most of the cases quoted seem beside the point.

On the other hand there is the case of Bakir, Mirali (page 5, line 37) who gifted land to his son-in-law; and the evidence of Kham (witness, defendant 2) is that this gift was contested unsuccessfully by collaterals (though there is no documentary evidence as to any such suit having been brought.)

But even apart from instances the case is a strong one for the defendants. That Azam was a *khanadamad* has been clearly found by the first Court, and though the learned Divisional Judge has brushed this question aside as immaterial, we find no difficulty in concurring with the first Court; the learned counsel for the appellants has not touched on the evidence on the point. The donor's daughter had also married a near collateral, and in such circumstances the daughter's right to exclude collaterals would be not at all unusual, even according to the general custom of the province, (see Rattigan's Digest of Customary Law, Article 23, *proviso*) and the entries in the *Riwaj-i-am* strengthen the defence enormously. A very similar case among Thahims of this same *tahsil* was decided by this Court in Civil Appeal No. 1168 of 1905, where a gift to a



daughter was upheld as against the donor's nephews ; reliance was there placed on the same *Riwaj-i-am*.

According to the *Riwaj-i-am Kaumwar* Thahims and Mirali Sials follow the same custom. And if we look to the custom in Jhang, from which district these Mirali Sials came to Multan, we find the same custom, *viz.*, that a daughter's right to exclude collaterals depends on her marrying a near agnate. See *Baksu v. Amir* <sup>(1)</sup>. Here the donor is still alive, and the succession has not yet opened out, but independently of the fact that the provisions of the *Riwaj-i-am* are in favour of a gift by a sonless proprietor, it is merely a case of accelerating succession. We concur with the lower Courts in holding the gift to be valid and dismiss the appeal with costs.

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No. 54.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

RUGH NATH DAS—(DEFENDANT)—PETITIONER,

*Versus*

DOCTOR PANNA LAL—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 2247 of 1908.

*The Provincial Small Cause Court Act, IX of 1887, section 17—Payment of decretal amount in executing Court on an ex parte decree by another Court is equivalent to payment into the latter Court and does not bar an application for setting aside the ex parte decree.*

An *ex parte* decree was passed by the Cantonment Small Cause Court, Ambala, and transferred for execution to Multan. The judgment-debtor paid the decretal amount into the Multan Court on 3rd June, 1908 and made an application for setting aside the *ex parte* decree to the Ambala Court on 16th June 1908, the Court rejected the application on the grounds that the decree had been satisfied and had ceased to exist inasmuch as the deposit under section 17 of the Small Cause Court Act, 1887, should have been made in the Ambala Court. The decree-holder took the money out of the Multan Court on 17th June.

*Held*, that the application for setting aside the decree was made while it was alive and the payment into the Multan Court was no bar to the application made to the Ambala Court and must be treated as a compliance with the rule laid down in section 17 of the Provincial Small Cause Court Act, 1887.

*Petition under section 25 of Act, IX of 1887, for revision of the order of Lieutenant-Colonel R. E. S. Taylor, Judge, Small Cause Court, Ambala Cantonment, dated the 10th August 1908.*

Vishnn Singh, for petitioner.

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<sup>(1)</sup> 47 P. R., 1896.

12th Jan. 1910.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—An *ex parte* decree was passed by the Judge of the Cantonment Small Cause Court, Ambala, and was transferred for execution to Multan.

The judgment-debtor-petitioner paid the amount decreed into the Multan Court on the 3rd June 1908, execution having been applied for.

On the 16th June an application, dated June 13th, for setting aside the *ex parte* decree was made to the Ambala Court, which rejected the application on the ground apparently that the decree had been satisfied and had ceased to exist, possibly on the ground that deposit under section 17 of the Small Cause Courts Act should have been made in the Ambala Court, not in the Multan Court.

In my opinion neither of these reasons is valid. The decree having been transferred to the Multan Court the Ambala Court would presumably have refused to accept any tender of the amount decreed. While the application for setting aside the decree was rightly made to the Court which passed the decree.

Payment into the Multan Court had, in my opinion, the effect of deposit in the Ambala Court under section 17 of the Small Cause Courts Act, and in *Muhammad Fazal Ali v. Karim Khan* <sup>(1)</sup> it was held that the words in the section “at the “time of presenting his application” are merely discretionary and not mandatory, the period being extendible at the direction of the Court. *A fortiori* deposit may be made before the application is presented.

The decree-holder took the money out of the Multan Court on the 17th June, and the decree was then recorded as satisfied. The application for setting the decree aside was therefore made while it was alive, and, in my opinion, the payment into the Multan Court was no bar to the application made to the Ambala Court, and must be treated as a compliance with the rule laid down in section 17 of the Small Cause Courts Act. I allow the application, set aside the order of the Court below and return the record to that Court for disposal on the merits of the application for setting aside the *ex parte* decree. Petitioner's counsel's fee and other costs incurred by the petitioner in this Court will be costs in the cause. Counsel's fee sixteen rupees.

*Revision allowed.*

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<sup>(1)</sup> 108 P. R. 1894.

## No. 55.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice  
Shah Din.*

THE FIRM OF SHERU MAL CHAINA MAL—(PLAINTIFFS)—  
APPELLANTS,

*Versus*

MR. F. VON GOLDSTEIN AND ANOTHER—(DEFENDANTS)—  
RESPONDENTS.

Civil Appeal No. 41 of 1908.

*Principal and agent—Goods received by agent on written authority—Sui  
against principal.—Indian Limitation Act, XV of 1877, section 19—Acknow-  
ledgment by agent.*

*Held*, that under the provisions of section 19 of the Indian Limitation Act, 1877, an acknowledgment may be signed by an agent duly authorized and an agent who has authority to receive goods for his principal has also implied authority to sign an acknowledgment of balances due, and that such acknowledgment is good although the correctness of the amount charged is not admitted, and the acknowledgment is conditional and subject to the principal's approval.

*Held*, also that a suit for the price of timber supplied to the agent of a contractor on the authority of a letter lies against the contractor.

*Further appeal from the decree of C. L. Dundas, Esquire, Divi-  
sional Judge, Ambala Division, dated the 11th October 1907.*

Shadi Lal, for appellants.

Fazl-i-Hussain, Pir Buksh and Zia-ud-din, for respondents.

The judgment of the Court was delivered by

RATTIGAN, J.—The facts of this case are fully set forth in 19th April 1909. the judgments of the Lower Courts. It appears that in 1899 and thereafter the defendant No. 2, Mr. Felix Von Goldstein, had several contracts with respect to the building and repairs of certain houses at Simla. Plaintiffs are a firm of timber merchants at the said place, and it is admitted that on the 16th June 1899 Mr. F. Von Goldstein executed the document exhibit P 2, and handed the same to defendant No. 1 Bhola, for transmission to plaintiffs' firm. The terms of this document are set out in both the judgments of the Lower Courts and we need say no more about them than that they in unqualified terms authorise the plaintiffs to whom the document was addressed to "let Bhola, Munshi, have any timber he may require" and to debit Mr. Goldstein's account. Plaintiffs



contend that in reliance upon this authority, they from time to time supplied timber to Bhola from 1899 to 1902. It is not denied that this timber was actually supplied to Bhola and that it was used (with the exception of some trifling quantity which Bhola says he wanted for his own purposes) in connection with Mr. Goldstein's contracts. Plaintiffs now sue defendant No. 1 and defendant No. 2 for the price of the timber so supplied and admit that they have been paid a sum of Rs. 4,000-15-6. In their plaint they set out all the facts and allege that on the 6th July 1902 defendant No. 1, with the consent of defendant No. 2, struck a balance admitting that the sum of Rs. 3,621-8-9 was due to plaintiffs on this account. They allege that a sum of Rs. 62 was subsequently paid to them and they now sue for a sum of Rs. 3,559, plus Rs. 1,200 as interest. Defendant No. 1 pleaded that he was not personally liable for this debt, as plaintiffs were well aware that he was acting merely as the agent of defendant No. 2 and that in point of fact the account in plaintiffs' books purported to be with defendant No. 2. The latter pleaded that the document relied upon by plaintiffs (Exhibit P. 2) was intended to be an authority for supply of timber merely for petty works in connection with his contract for work then being done on the Yarrow's estate; that defendant No. 1 had no authority from him to get timber for other work; that defendant No. 1 was not his agent but a sub-contractor and had no authority to strike any balance, and that he (defendant No. 2) had made no payments to plaintiffs. Both defendants pleaded that the suit was barred by limitation.

The District Judge held that defendant No. 1 was the agent of defendant No. 2 in these transactions, and that the timber supplied to him was supplied on the clear and unrevoked authority of defendant No. 2 as given in Exhibit P. 2. He further held that Exhibit P. 1, dated 6th July 1902, could not be regarded as a striking of a balance, but that it was an acknowledgment sufficient to save limitation under section 19 of the Indian Limitation Act, 1877. He accordingly absolved defendant No. 1 from all liability but granted plaintiffs a decree for the full amount claimed against defendant No. 2.

The latter appealed to the Divisional Judge who reversed the finding of the District Judge and held that Exhibit P. 2 could not reasonably be held to authorise anything more than one delivery of timber to Bhola, and that it could not be held to "authorise a series extending over years." In arriving

at this conclusion the learned Judge laid considerable stress upon the fact that no delivery was made directly to defendant No. 2, but that every payment of money to plaintiffs was made by defendant No. 1. He further held that the acknowledgment (if it could be so called) by defendant No. 1 on the 6th July 1902 (Exhibit P. 1) did not purport to bind, and in law could not bind defendant No. 2.

The greater part of the learned Judge's judgment is concerned with the question (which upon our view of the case does not here arise) whether in the circumstances of the case the plaintiffs could ask for a decree against defendant No. 1 in view of the fact that so far as he was concerned, they had not appealed from the decree of the District Judge or filed cross-objections within the period allowed by law.

Upon his finding the Divisional Judge dismissed plaintiffs' claim against defendant No. 2, and plaintiffs have preferred a further appeal to this Court. Their main contention is that they have a good and legally valid claim against defendant No. 2, but they also plead that if their claim against that defendant is found to be untenable, they should be given a decree against defendant No. 1.

We have heard arguments at length upon the first question, but as after hearing these arguments, we were of opinion that the suit must prevail as against defendant No. 2, we did not think it necessary to consider the second question. In our opinion, the case is really a very simple one, Mr. Goldstein admittedly executed Exhibit P. 2, and in terms it is an unqualified and unconditional authority to plaintiffs to supply Bhola, Munshi (defendant No. 1), with all such timber as he may require. Mr. Goldstein is a well known contractor at Simla, and at the time when he executed this document, he had several contracts on hand with regard to the building and repairs of houses at Simla. He is presumably a business man and knows the ordinary meaning of simple words. He gives Bhola a written authority, addressed to plaintiffs to the effect that the latter are to supply Bhola "with any timber he may require." In face of this document it is absurd for Mr. Goldstein to contend that he only authorised plaintiffs to supply Bhola with timber for petty work at the "Yarrows." How were plaintiffs to know that this authority, expressed as it was in the most general terms, was intended to be limited in the manner suggested? But this is not the only answer to Mr. Goldstein's plea. It is not denied that the latter had occasion

to use timber for many other buildings and repairs, nor is it denied that for these purposes Bhola got the timber from the plaintiffs. Is it reasonable to suppose that Mr. Goldstein, who had found it necessary to give Bhola a written order in order to enable him to get timber for "petty work" at the "Yarrows Estate," had no idea that Bhola was getting the timber for all these large contracts from plaintiffs' firm and on the strength of Exhibit P. 2? If Bhola could not on his own credit obtain timber for certain petty work at the "Yarrows," it should certainly have struck Mr. Goldstein as remarkable that he could obtain large supplies of timber for other purposes without having to apply to him again for authority to get those supplies.

The Divisional Judge goes even further than Mr. Goldstein in restricting the scope of Exhibit P. 2. Mr. Goldstein admits that in any event that document authorised the plaintiffs to supply Bhola with timber for all petty work at the "Yarrows," but the Divisional Judge would limit the authority (despite its general terms) to one delivery only.

In our opinion it is quite immaterial for the present purposes to consider the exact nature of the relationship that may have existed between defendant No. 1 and defendant No. 2. The former may have been the agent of the latter or a subcontractor under him, but the nature of the contract between the two cannot possibly affect third parties such as the plaintiffs. So far as plaintiffs were concerned, the authority given by Exhibit P. 2 was sufficient justification for their supplying Bhola with any timber he might require until they were duly informed that the authority given by the document was revoked, and we cannot agree with the Divisional Judge that they were bound to take any steps to secure some acknowledgment or receipt from the principal. They had the latter's direct authority in writing, and it is admitted that the timber was actually being used for the benefit of Mr. Goldstein. Even if it had been used for other purposes, we are not prepared to say that plaintiffs would not have been entitled to recover, inasmuch as the authority was in the widest possible terms. But in the circumstances of the present case, we have no hesitation whatever in holding that they were justified in supplying any timber which Bhola might require and in assuming that this timber was needed for the purposes of defendant No. 2's contracts. The fact that payments for this timber were from time to time made by Bhola appears to us immaterial. He was regarded by plaintiffs as Goldstein's agent and as it



was to him that the timber was supplied, it was not surprising that all payments should be made through him, as he alone would know the quantities of timber supplied.

That the plaintiffs throughout looked to Goldstein as the person primarily liable is evident from the fact that this timber account is headed in their books "*Lekha Barrack Mastri Goldstein Sahib da San 1899 June to 19th*. No doubt the words "are added, *Munshi Bhola ke lakri dewai us de zimma ute chitthi se Sahib di*," but obviously these words are merely explanatory of the account and the words "*zimma di chitthi se Sahib di*" clearly mean that the wood was supplied on the strength of the *Sahib's* letter. We hold therefore that plaintiffs were justified in acting upon the plain terms of Exhibit P. 2 and in supplying timber to the latter whenever required by him until such time, as the authority of the letter to ask for timber upon the credit of Mr. Goldstein was duly revoked by Mr. Goldstein. Admittedly there was no such revocation of authority, and consequently Mr. Goldstein is liable to pay for the timber actually supplied to Bhola, provided that plaintiffs' claim is within time. And this brings us to the question of limitation. The timber was supplied from June 1899 to January 1902, and the present suit was instituted on the 6th July 1905. The claim would admittedly be barred by limitation in the ordinary way, but plaintiffs contend that limitation is saved by reason of the entry, signed by Bhola, in their books on the 6th July 1902. For Mr. Goldstein Mr. Fazl-i-Hussain argues that this entry does not bind his clients for two reasons, (1) because Bhola was not an agent duly authorized to make the acknowledgment within the meaning of section 19, Explanation (2) of the Indian Limitation Act, and (2) because it does not in its terms admit the correctness of the account or that any sum is due to plaintiffs and was expressly stated to be made subject to Mr. Goldstein's approval.

In our opinion neither contention is tenable.

Under the provisions of section 19 of the Limitation Act of 1877, the acknowledgment may be signed either by the principal debtor himself or by an agent duly authorized in this behalf. In the present case the acknowledgment was certainly not signed by Mr. Goldstein, but it was unquestionably signed (assuming, for the moment that the entry amounted to an acknowledgment) by Bhola. The question is whether Bhola was an agent duly authorized to sign this entry? There can

be no question that under the terms of Exhibit P. 2 Bhola was entitled to apply to plaintiffs' firm for timber, and having authority to take supplies of timber, he had obviously the right to do every lawful thing in order to get these supplies (section 188 of the Indian Contract Act). Plaintiffs would clearly be within their rights in demanding from Bhola an acknowledgment or receipt of any such supplies made to him, and equally clearly Bhola would have the right to give plaintiffs a written acknowledgment or receipt that he had from time to time received such and such an amount of timber. It was thus within the scope of Bhola's authority to admit in writing that he had on various occasions received from plaintiffs supplies of timber, and that in respect of such supplies, plaintiffs had a claim against his principal, though at the same time Bhola made no admission that plaintiffs' accounts were correct. The learned Divisional Judge overlooks this point when he says that Mr. Goldstein may have authorized Bhola to take over planks, but that it does not necessarily follow that he employed Bhola as his personal accountant. There is here no question of Bhola acting as a "personal accountant." He had been given certain supplies of timber he was authorized to take, and the plaintiffs were authorized to give him those supplies, and in the circumstances Bhola had clearly the right to admit that he had received timber of a certain amount or value from plaintiffs. If A authorizes B to supply goods to X, A is naturally within his right when he demands from B proof that X has received such and such goods, and equally clearly B is entitled to say to X, 'you must give me an acknowledgment 'that you have received these goods from me.' If this be so, and we cannot see how the proposition can be gainsaid, the necessary inference is that it is within the general scope of X's authority to give B an acknowledgment that such goods have been from time to time received by him on A's account. It has been held by this Court that the words "duly authorized, "in that behalf" do not mean specially or expressly authorized and that they are the proper designation of an agent acting within the scope of his powers, ordinary or special. *Jodh Raj v. Chuttan* (1) and note thereto.

We hold, therefore, that it was within the scope of Bhola's authority to admit that there was an open and running

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(1) 7 P. R. 1890.

account between his principal and the plaintiffs in respect of the supplies of timber made by the latter to him upon strength of the authority of Exhibit P. 2. We do not think that the fact that Bhola made this admission after various supplies had been made, instead of making it at the time of each delivery, is, in any way, material.

As regards the second question, we have no hesitation in holding upon the authorities that the entry in question is a sufficient acknowledgment for the purposes of section 19 of the Limitation Act. It was, no doubt, no admission that the amount claimed was correct, and it was made conditionally and subject to Mr. Goldstein's approval. But it was nevertheless an admission that at the time when it was made there was an open and current account between plaintiffs and Bhola's principal, and as such it was a good and valid acknowledgment for the purpose of saving limitation under section 19 (see as to this *Mani Ram Seth v. Seth Rup Chand* <sup>(1)</sup>, *Sitayya v. Ranga Reddi* <sup>(2)</sup>, *Rungo Lall Lohea v. Wilson* <sup>(3)</sup>, *W. R. Fink v. Buldeo Dass* <sup>(4)</sup> and *Abdul Ali v. Mr. F. Von Goldstien* <sup>(5)</sup>).

We hold, therefore, that this entry had the effect of giving a new period of limitation, and that consequently the present claim is within time. Mr. Fazl-i-Hussain does not deny that if the entry can be regarded as an acknowledgment within the meaning of section 19 of the Limitation Act, the suit cannot be held to be barred.

Before concluding we must advert for a moment to Mr. Fazl-i-Hussain's argument that the claim as laid in the plaint is based upon an alleged balance of account struck on the 6th July 1902 by Bhola and that, as no such balance was ever struck, the plaintiffs' claim must fail. It must be admitted that the plaint is very badly drafted and that taken in its literal meaning, it would seem to imply that plaintiffs' cause of action was the alleged striking of the balance on the date mentioned. It must also be conceded that the entry relied upon as the striking of a balance cannot possibly be interpreted as such. But it is clear that neither the parties themselves nor the Lower Courts regarded the suit as based on a balance struck. The plaint sets out in full detail all the facts of the case and recites the terms of

(1) (1906) *I. L. R.* 33 *Cal.* 1047 *P. C.* (3) (1899) *I. L. R.* 26 *Cal.* 204.

(2) (1887) *I. L. R.* 10 *Mad.* 259, (4) (1889) *I. L. R.* 26 *Cal.* 715,

(5) 14 *P. L. R.* 1909 *S. C.* 43 *P. R.* 1910.



Exhibit P. 2, which was filed as an Exhibit with the plaint, and it is obvious from the pleadings of the parties and the evidence given in the case that both plaintiffs and defendants looked upon the claim as one based on the general accounts. The District Judge and the Divisional Judge undoubtedly regarded it in this light, and until the hearing before us no one suggested that plaintiffs' case must fail, because it was based on an alleged striking of a balance, which was in fact never struck at all. The plaintiffs certainly relied upon the entry made by Bhola on the 6th July 1902, but every one seems to have taken it for granted that this entry was really referred to for the purposes of saving limitation. We think it is now too late for defendants to contend that the basis of the suit was a balance of account, and that as such balance has not been proved, the claim must fail.

Taking all the facts into consideration, we are of opinion that the District Judge arrived at a right conclusion, and we, therefore, accept this appeal, and reversing the decree of the Lower Appellate Court, we restore that of the District Judge. We have only to add that defendant No. 2 (Mr. Goldstein) must pay the costs of this appeal.

*Appeal accepted.*

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**No. 56.**

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Robertson.*

**BHAGWANA—(PLAINTIFF)—APPELLANT,**

*Versus*

**GORU AND OTHERS—(DEFENDANTS)—RESPONDENTS.**

**Civil Appeal No. 337 of 1908.**

*Civil Procedure Code, Act XIV of 1882, section 214—(Order 20, rule 14, Civil Procedure Code, Act V of 1908) Pre-emption suit—price fixed by first Court—decree paid in after deducting costs—price raised by Appellate Court—Payment of difference without costs previously recovered—Sufficient compliance.*

Where in a suit for pre-emption the first Court passed a decree for possession of certain property on payment of Rs. 430 authorising the pre-emptor to deduct Rs. 5-14-0 as costs and it was so paid by the pre-emptor within the time fixed by the Court, but on appeal by the vendee the price was raised to Rs. 512, reversing the order as to costs, but no notice of the exact additional amount payable was given to the pre-emptor, who paid in Rs. 82, the difference between Rs. 430 and Rs. 512 whereupon the vendee contended that the order of the Appellate Court had not been complied with.

*Held, following Balmokand v. Pancham* <sup>(1)</sup> that the payment of the difference within the time allowed without the costs already realised was

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<sup>(1)</sup> (1888) *I. L. R.* 10 *Al.* 400.

a sufficient compliance with the decree of the Appellate Court and the vendee was separately entitled to recover costs.

*Miscellaneous appeal from the order of S. W. Gracey, Esquire, Additional Divisional Judge, Hoshiarpur Division, dated the 13th January 1908.*

Sunder Das and Fazl-i-Hussain, for appellant.

Devi Dial, for respondents.

The judgment of the Court was delivered by

ROBERTSON, J.—The facts in this case are very simple :—

One Bhagwana sued for possession by pre-emption of certain property alleging the actual price paid to be Rs. 430. The Court of first instance decreed entirely in his favour and passed a specific order decreeing his claim and authorising him to pay in Rs. 430 after deducting Rs. 5-14-0 out of it on account of his costs which were adjudged to him, the present appellant did so that is he did what was exactly the same thing as paying in Rs. 430, and taking back Rs. 5-14-0, he complied precisely with the order. 23rd April 1909.

The vendee appealed and the price to be paid was raised to Rs. 512, by the Appellate Court, but no slip (*parcha*) showing the exact additional amount payable was given to the present appellant, who paid in Rs. 82, the difference between Rs. 430 and Rs. 512. The Appellate Court however reversed the order of the first Court as to costs and decreed that each party should pay his own costs—the vendees-defendants Gorn, etc, were therefore entitled to receive back Rs. 5-14-0 as costs and it is contended that because this Rs. 5-14-0, was not paid in with the Rs. 82, the order of the Appellate Court was not complied with and consequently appellant has lost his right to possession by pre-emption. It must be noted that the Appellate Court's order did not call upon appellant to pay in Rs. 512 *and costs* but Rs. 512 only,

The judgment in *Balmokand v. Pancham* <sup>(1)</sup> appears to us to be exactly in point. In the case Rs. 125 was the amount ordered by the first Court to be paid in, and it was paid in, and Rs. 39-4-0 was subsequently recovered by the decree-holder on account of costs in execution. As a matter of fact it appears to have been paid out of this Rs. 125, which had been paid in on 13th January 1894. On 5th March 1894 the Appellate Court raised the amount payable to Rs. 200, and decided that each

<sup>(1)</sup> (1898) I. L. R. 10 All. 400.

side should pay their own costs, and the position was then exactly similar to this case. The decree-holder had to pay Rs. 75, to make up the Rs. 200, and was also liable for a refund of Rs. 39-4-0 costs which he had drawn out of the Rs. 125 originally deposited. That Rs. 125 was short by Rs. 39-4-0 for exactly the same reason as the Rs. 430 was short by Rs. 5-14-0 in this case—in the one case Rs. 39-4-0 in the other Rs. 5-14-0 had been recovered as costs. It is to be noted further in the case before us that the vendees put in a petition asking that the Rs. 5-14-0 should be made up and Bhagwana, appellant, accordingly paid in that sum. Subsequently the vendees made the objection under consideration.

After hearing arguments and considering the case, we agree with the view taken by the majority in *Balmokand v. Pancham* <sup>(1)</sup>. The fact that costs were, by specific order, allowed to be deducted from Rs. 430 when it was paid in does not alter the fact that this sum was really recovered as costs. When the order as to costs was reversed, restitution of this sum could no doubt be claimed, was claimed, and it was repaid. We consider this transaction separate from the payment of the capital sum, Rs. 512, decreed by the lower Appellate Court, towards which Rs. 430 must be held to have been paid in the first Court. There was no order that Rs. 512 "and costs" must be paid by a certain date. Had the order been in these terms, the case would have been different. We think that Rs. 430 was actually paid; at the time the decree-holder was entitled to Rs. 5-14-0 as costs, and he paid Rs. 430 as follows:—

Rs. A. P.

424 2 0 in cash.

5 14 0 credit on account of costs.

430 0 0 total actually paid.

Consequently under the orders of the Appellate Court only Rs. 82 on this account had to be further paid by due date, and the judgment-debtor was separately entitled to recover Rs. 5-14-0 on account of costs. This is the view taken in *Balmokand v. Pancham* <sup>(1)</sup>, and we concur in that view. We accordingly decree the appeal, set aside the judgment and decree of the lower appellate Court and restore that of the first Court; dismissing the application of the judgment-debtor. Costs against respondents throughout.

*Appeal allowed.*

<sup>(1)</sup> (1886) I. L. R. 10 All. 400.



No. 57.

*Before Hon. Mr. Justice Shah Din.*

GHAUNS—(PLAINTIFF)—PETITIONER,

*Versus*

IMAM DIN AND OTHERS—(DEFENDANTS)—RESPONDENTS,

Civil Revision No. 2018 of 1909.

*Ancestral property—Land taken in exchange for ancestral land becomes itself ancestral.*

*Held* that in the case of an exchange the character of the land acquired is that of the land parted with, and if the latter was ancestral, the acquired land is equally ancestral.

Petition under section 70 (a and b.) of Act XVIII of 1884 as amended by Act XXV of 1890 for revision of the decree of A. H. Parker, Esquire, Officiating Divisional Judge, Jullundur Division, dated the 3rd May 1909.

Beni Pershad, for petitioner.

Fazal Elahi, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—It is not disputed that the land in suit was 9th March 1910 taken by Imam Din in exchange for ancestral land, and that being so, it is clear that it must be treated as ancestral property. The Counsel for the respondents admits that he cannot support the judgment of the Divisional Judge, which is based upon an erroneous view of the principle applicable to cases such as the present. That principle has been laid down in a Division Bench decision of this Court (Civil appeal No. 304 of 1897) in these terms :—

“ In the case of an exchange, the character of the land acquired would be that of the land parted with, and if the latter were ancestral, the acquired land would be equally ancestral.”

I hold, therefore, that the land in suit is ancestral property *qua* the plaintiff; and I accordingly accept this revision and setting aside the decree of the lower Appellate Court remand the case for decision on the merits.

The costs will follow the event.

## No. 58.

*Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.*

MUZAFFAR ALI AND OTHERS—(PLAINTIFFS)—  
APPELLANTS,

*Versus*

MUSSAMMAT ZAINAB AND OTHERS—(DEFENDANTS)—  
RESPONDENTS.

Civil Appeal No. 1260 of 1907.

*Custom Alienation—Gift by widow to her daughter—locus standi of collaterals succession of daughter—Sayyads of mouza Chuma tahsil and district Gurgaon.*

*Held*, that among Sayyads of mauza Chuma, tahsil and district Gurgaon, daughters succeed to the property of their fathers to the exclusion of the latter's collaterals and therefore the collaterals have no right to contest the gift made by the widow of the last male owner in favour of her daughter.

*Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated the 13th July 1907.*

Devi Dial, for appellants.

Fazl-i-Hussain for respondents.

The judgment of the Court was delivered by—

7th May 1910.

SHAH DIN, J.—This appeal is a sequel to further appeal No. 326 of 1906, which was decided by this Court on the 8th January 1907. In this Court's judgment in that appeal it was held that the Divisional Judge had approached the case from a wholly erroneous standpoint upon a misconception of the pleadings of the parties, and the suit was remanded to the Divisional Court for a fresh decision with reference to the question whether or not by custom applicable to the parties Mussammat Umaidan, as daughter of Abad Ali, the last male owner of the land in suit, was entitled to succeed to his property after the death of his widow, Mussammat Zainab, in preference to the plaintiffs, who are Abad Ali's collaterals. The learned Divisional Judge remanded the case to the Court of first instance, under section 566 of the Civil Procedure Code of 1882, and on receipt of a return to his order of remand, has held that among the parties' tribe the daughters succeed to the property of their fathers to the exclusion of the latter's collaterals, and that, therefore, the plaintiffs in this case have no right to question the gift in dispute, which was made by Mussammat Zainab, widow of Abad Ali, in favour of her daughter, Mus-

sammat Umaidan. Upon this finding the learned Judge dismissed the plaintiffs' suit.

The plaintiffs have preferred a further appeal to this Court, and we have heard the case argued on both sides with reference to the question of custom involved in it, and have examined the instances relied upon on either side. As a result we hold that the view of the Divisional Judge as to the custom applicable to the parties is correct, and the appeal must, therefore, fail.

The parties are Sunni Sayyads of *mauza* Chuma, *tahsil* and district Gurgaon. The land in dispute belonged to Abad Ali, who died sometime ago, leaving a widow, Mussammat Zainab, and a daughter, Mussammat Umaidan. Mussammat Zainab succeeded to the land in suit on the usual widow's life estate; and on the 16th March 1904 she made a verbal gift of it in favour of her daughter Mussammat Umaidan, mutation of names in respect of this gift being sanctioned on the 30th June 1904. The plaintiffs, who are collaterals of Abad Ali in the fourth degree of agnatic relationship, brought the present suit on the 1st July 1905, for a declaration of the invalidity of the gift referred to above, alleging that they were entitled to succeed to the property in dispute after the death of Mussammat Zainab and that the latter had no power to make the gift in question in favour of her daughter, Mussammat Umaidan. On behalf of Mussammat Umaidan it was pleaded that she was entitled to succeed to her father's property after the death of her mother, Mussammat Zainab, in preference to the plaintiffs, and that, therefore, the gift in dispute being one in favour of the next heir could not be challenged by them. The crucial point on which the parties were at issue in this case was, as pointed out in this Court's order of remand, dated the 8th January 1907, whether among the parties' tribe daughters were entitled to succeed to the estates of their fathers in the presence of the collaterals of the latter; and on this point, after having a most exhaustive inquiry made in several villages in *tahsil* Gurgaon which are inhabited by Sunni and Shia Sayyads, the Divisional Judge (Mr. Clifford) has found in favour of the respondent Mussammat Umaidan.

According to the *Riwaj-i-am* of the Gurgaon district, Sayyads without distinction of sect, allow daughters to succeed in the absence of sons or widows, and no less than six instances of the succession of daughters in the presence of collaterals are



cited in the said *Riwaj-i-am*. (See instances among Sayyads given in answer to Question No. 1 under the heading "rights of daughters and their issue.") In answer to Questions Nos. 4 and 5 also some more instances of the succession of daughters to their father's estates are cited. The *Riwaj-i-am* says that the custom of Sayyads and Sheikhs as regards daughters' rights of succession is the same, and, therefore, instances of daughters' succession to the exclusion of collaterals among Sheikhs are relevant in the present case and have been referred to and discussed in argument before us. As the entry in the *Riwaj-i-am* which governs the parties is supported by concrete instances, a presumption of correctness attaches to it as a record of custom, and the respondent Mussammat Umaidan, therefore, starts with a presumption in her favour, and the *onus* lies upon the plaintiffs of proving that they exclude Mussammat Umaidan from her father's inheritance. It is not disputed that if the plaintiffs fail to discharge this *onus*, then the gift in dispute would be valid, inasmuch as the action of the widow, Mussammat Zainab, in making that gift was but a surrender of her estate in favour of the next heir intended to accelerate the latter's succession. Apart from the instances given in the *Riwaj-i-am*, numerous other instances were cited in the course of the original enquiry made by the Court of first instance before the case was remanded by this Court. The patwari of mauza Hasanpur cited one instance, the patwari of Raulpur cited two instances, the patwari of Sultanpur cited two instances, the patwari of Turkiawas cited five instances and the patwari of Pangaur cited four more instances of the succession of daughters to the exclusion of collaterals among Sayyads in the said village, respectively.

The respondents' witnesses who have been examined in this case after the remand mentioned a large number of instances in favour of the daughters' rights of succession among the Sayyads and Sheikhs of *tahsil* Gurgaon which have been noticed in detail by the Divisional Judge. The first witness, Said-ud-din, deposes to his own mother succeeding to her father's property in Turkiawas. The second witness, Alas Ali of Jharsa, gives four instances of daughters' succession of which two relate to Sayyads and the other two to Sheikhs. Three out of these four instances are supported by documentary evidence in support of them. The third witness, Mansab Ali, cites three instances but these have been left out of consideration by the Divisional Judge on the ground that there is no docu-

mentary evidence in support of them. The fourth witness, Mahbub Bakhsh, mentions two instances among Sheikhs of Bagrola. The sixth witness, Muin-ud-din, cites three instances in the village of Palla, one being a Sayyad instance and the other two being instances among Sheikhs.

The plaintiffs-appellants have throughout admitted that among Shia Sayyads daughters do succeed to their father's property in preference to collaterals, but they have urged that the custom of Sunni Sayyads on this point is different from that of Shia Sayyads. This, in our opinion they have failed to prove; and the fact that the entry in the *Riwaj-i-am* referred to above makes no distinction between Shia Sayyads and Sunni Sayyads and applies to all Sayyads and Sheikhs alike, strongly supports the respondents' case. As the Divisional Judge has pointed out, the plaintiffs practically rely in support of the alleged exclusion of daughters by collaterals on the four instances in the village of the parties, *mauza Chuma*, in which the daughters did not succeed to their fathers' property in the presence of agnates. The facts of those four instances are elucidated by reference to the four pedigree-tables printed at page 9 of the paper-book as appendix to the Divisional Judge's judgment. The first instance is that of Mussammat Khuban, daughter of Asad-ullah, who was excluded by Hosain Ali, nephew of Asad-ullah. This exclusion, however, as the Divisional Judge explains, was probably due to the fact that Mussammat Khuban was married in *mauza Purana Killa* at a great distance from her native village. The second instance is that of Mussammat Kallo, daughter of Rahm Ali, who appears to have been excluded by the latter's agnates but the reason for exclusion in this case was the same as that in the first case, namely, that the daughter was married off in a distant village. The other two instances are those of the exclusion of daughters among Sheikhs and in those instances the one circumstance in common appears to be that either the daughters were married to near collaterals who succeeded to their fathers' property or they were married off in a distant village. The special facts of these four instances as explained above greatly detract from their value as instances of custom at variance with the rule of succession as laid down in the *Riwaj-i-am*, but even if those special circumstances were absent, we are unable to hold that these four instances suffice, in face of the overwhelming number of instances on the other side, to turn the scale in favour of the plaintiffs-appellants. The respondents' counsel has, at our

request, prepared a statement of the instances cited in the *Rivaj-i-am* and by his client's witnesses in the first Court in reference to the question of custom under consideration, and we have placed that statement on the record. From that statement it will be found that there are no less than about 30 instances in which among Sayyads of the Gurgaon district daughters have succeeded to the property of their fathers in preference to the collaterals; and it is, therefore, clear that the four instances relied upon by the plaintiff-appellants, only two of which are Sayyad instances, cannot be considered sufficient evidence of the alleged custom on which their suit is founded.

The recent decision of this Court in *Mussammat Maqsood-ul-Nisa v. Mussammat Kaniz Zohra* <sup>(1)</sup> which is referred to by the Divisional Judge and which has been reported since the learned Judge delivered his judgment, helps the respondents in so far as it shows that the entry in the *Rivaj-i-am* of the Gurgaon district which has been relied on by them has been considered as a reliable record of custom by this Court. At page 616 of the report the learned Judges observe as follows:—  
 “The evidence on the record makes it quite clear that Mussammat Kaniz Zohra succeeded in the absence of male heirs competent to exclude her. The *Rivaj-i-am* is very clear on this point, and among the Sayyads of Gurgaon a daughter is said to exclude any but sons and grandsons and several instances are given of such succession, including one in which the daughter gifted part of the estates to her son. The *Rivaj-i-am* provides in answer to a very explicit and exhaustive question that a daughter succeeds to a full estate.”

The *Rivaj-i-am* in question is, therefore, of more than ordinary value and it constitutes weighty evidence in support of Mussammat Umaidan's right to succeed to the property of her father.

For the foregoing reasons, we maintain the decree of the Divisional Judge and dismiss this appeal with costs.

*Appeal dismissed.*

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(1) 135 P. R. 1908.



## No. 59.

*Before Hon. Mr. Justice Johnstone.*

MUSSAMMAT UMDA—(DEFENDANT)—PETITIONER,

*Versus*

DELBAGH RAI—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 169 of 1910.

*The Punjab Loans Limitation Act, I of 1904 Article 57—Applicability to  
—Transfer of liability for debt.*

On 31st March 1902, one Mussammat M., guardian of certain minors, sold property to G. A. K., deceased husband of defendant, for Rs. 363-8-0 being part of the amount due by the minors to plaintiff, the purchaser undertook to pay the said sum to plaintiff and the plaintiff agreed to look to him for it. The deed of sale was deposited with plaintiff. On 18th February 1908, plaintiff brought a suit against the widow of G. A. K., for recovery of the debt and was met with a plea of limitation. The first Court held the suit fell under Article 59 or 61 and decreed the claim. The Divisional Judge on appeal confirmed the decree but held that article 59 applied. The Chief Court on revision

*Held*, that the case was one of mere transfer from one person to another of liability for a debt, G. A. K., having stepped into the shoes of the minors to whom money had been lent, and that Article 57 as amended by the Punjab Loans Limitation Act, 1904, applied (money payable for money lent").

*Petition under section 70 (1), (a) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 19th March 1909.*

Fazl-i-Hussain, for petitioner.

Ram Bhaj Datta, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—On 31st March 1902 one Mussammat Miro, 27th May 1910 guardian of certain minors, sold property to Ghulam Ahmad Khan, deceased husband of defendant, for Rs. 363-8-0, part of the minors' debt to plaintiff, and it is alleged that the purchaser undertook to pay off that debt and that plaintiff agreed to look to him for it. Now on 18th February 1908, plaintiff sues the widow for Rs. 363-8-0 *plus* interest, total Rs. 510. It seems that the deed of sale was deposited with plaintiff.

Defendant pleaded limitation and among other pleas also objected to paying interest. The first Court framed issues and held that the suit fell under Article 59, Schedule II, Limitation Act or Article 61, and so was within time; that plaintiff released

the original debtors because Ghulam Ahmad Khan undertook liability : that plaintiff's suit for money lies, in that the title-deed was deposited with the plaintiff merely as "evidence" ; that Ghulam Ahmad Khan never paid the money ; and that interest is claimable.

The learned Divisional Judge on appeal confirmed the decree of the first Court, holding that Ghulam Ahmad Khan did incur a debt to plaintiff of Rs. 363-8-0 ; that the money must be taken as a loan by plaintiff to him ; and that Article 59 aforesaid applies.

Defendant applies for revision on the ground that the sale-deed shows that the sum of Rs. 363-8-0 was left with Ghulam Ahmad Khan as a deposit ; that he paid off this sum in his lifetime ; and that the suit is time-barred.

Now in my opinion, though the deed of sale does state that the purchase money is to be a deposit in the hands of the purchaser for payment to plaintiff, it does not follow that this is a correct description of the transaction. In the plaint it is said that Ghulam Ahmad Khan "*apne zimme manat karka*" credited it in the minor's account and got it entered in plaintiff's *bahi* as debt due by himself to plaintiff. This is also the finding of the first Court as to what really happened, and the finding is corroborated by plaintiff's own conduct in suing only Ghulam Ahmad Khan's widow and by her conduct in not objecting that the minors' vendors aforesaid were also liable.

To my mind the test whether there was a "deposit" with Ghulam Ahmad Khan of Rs. 363-8-0 is whether the minors remained liable to plaintiff, and so retained some sort of dominion over the purchase-money in the purchaser's hands. As they did not so remain, and as they had no further concern with vendee and the purchase-money, the case is one of merely transfer from one person to another of liability for debt ; and applying this test we see that the present is no case of "deposit."

To decide which article of the Limitation Schedule applies we must read articles 57 to 64. Article 58 obviously cannot apply, and Article 60 (deposit under an agreement for payment on demand), clearly has no bearing here. It is argued by defendant that Article 62 applies (for money payable by the defendant to the plaintiff for money received by the defendant for plaintiff's use) ; but I am unable to agree. This article only applies where a defendant has received money which in justice and equity belongs to plaintiff under circumstances which in law render

the receipt of it a receipt by the defendant for the use of the plaintiff. Nothing of this sort has happened here. Here the purchaser merely agreed to assume the position of a debtor to plaintiff in lieu of the vendors.

Turning to the other articles we find that whichever of them applies, the suit is within time—see Punjab Act I of 1904. No. 64 is hardly applicable because Ghulam Ahmad Khan did not himself write his liability in plaintiff's *bahi* or sign the statement of it; and No. 63 is beside the mark. No. 61 cannot apply, as plaintiff has not paid any money "for the defendant" in the sense of the term. It is far-fetched to talk of plaintiff paying Rs. 363-8-0 to the minors when all he did was to absolve them from liability. There remain Articles 57 and 59. I can see no agreement to pay on demand, though no doubt there was no agreement to the contrary; and I would apply article 57 (for money payable for money lent). Ghulam Ahmad Khan stepped into the shoes of the minors to whom money had been "lent," and thus the Rs. 363-8-0 is "money payable for money lent."

The suit is thus within time, and there seems no reason why interest should not be allowed.

Petition dismissed with costs.

*Revision Rejected.*

### No. 60.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Ryves.*

MUSSAMMAT KOKAN—(PLAINTIFF)—APPELLANT,

*Versus*

MUSSAMMAT LAKHOO AND OTHERS—(DEFENDANTS)—  
RESPONDENTS.

Civil Appeal No. 870 of 1908.

*Custom—Alienation—Alienation by widow—locus standi of the sister of last male owner in default of reversioners to contest an alienation—Ghirths of mauza Baldhar, tahsil and district Kangra.*

*Held*, that among Ghirths of mauza Baldhar, tahsil and District Kangra, a sister of the last male owner is, in the absence of collaterals, entitled as the next heir to contest an alienation made by the widow and to obtain a declaration that such alienation shall not affect her reversionary rights.

*Further Appeal from the decree of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 21st May 1908.*

Sukh Dial for appellant.

Tek Chand for respondents.



The judgment of the Court was delivered by :—

28th May, 1910.

SIR ARTHUR REID, C. J.—The parties are Gbirths, of the Kangra *Tahsil* and District and the questions for consideration are—(1) whether the sale by the widow of the last male owner was for necessity ; (2) whether, if it was not for necessity, the sister of the last male owner is entitled to a declaration that it does not affect her rights on the death of the widow.

Both Courts below have held that necessity for the sale has not been established and we concur in this conclusion. No serious attempt to establish necessity was, in fact, made.

On the second question the following authorities were cited :—

(1)—*Mussammatt Bhupia v. Jamna Das* <sup>(1)</sup>, in which it was held that under Customary law in the Delhi District or Civil Division remoteness of collaterals did not prevent their asserting their right to the estate of the last male owner on the re-marriage of his widow, the general rule being that succession passes to the next heir without any restriction as to the degree of relationship, provided the heirs are descended from an ancestor of the deceased owner.

(2) *Prem Singh v. Mussammatt Ramon* <sup>(2)</sup>, a case from Ferozepore, in which it was held that as alienations by widows stand on an entirely different footing from alienations by childless proprietors, the next reversioner, however remote, can sue to contest the former class of alienation.

(3) *Mussammatt Dyan v. Jai Ram* <sup>(3)</sup>, in which it was held that Brahmans of Gujrat were governed by Customary law, which did not entitle sisters to succeed with sister's sons.

(4) *Mussammatt Rakhi v. Mussammatt Fotima* <sup>(4)</sup>, in which it was held that, among Kanwali Arains of the Lahore district, the daughter of the brother of the last male owner could not interfere with an alienation by the widow of the latter, the niece not being a "legal heir," and the term *aulad* standing by itself denoting only males related through males.

(5) *Atma Ram v. Nauranga* <sup>(5)</sup>, in which it was held that a widow holds the land of her husband for a special purpose her own maintenance, and has not the entire interest for the time being, her interest terminating wholly at her death as the utmost limit, except where she has alienated for necessity.

<sup>(1)</sup> 80 P. R. 1885.

<sup>(3)</sup> 47 P. R. 1890.

<sup>(2)</sup> 11 P. R. 1888.

<sup>(4)</sup> 89 P. R. 1892.

<sup>(5)</sup> 24 P. R. 1894

(6) *Sher Muhammad Khan v. Muhammad Khan* <sup>(1)</sup>, a case of Manuzai Pathans of the Ajnala tabsil, Amritsar, in which it was held by Roe, C. J., that, though a daughter might succeed in the absence of true *warisan*, the mere expectation of succeeding did not entitle her to control the acts of the widow in possession of the estate. Chatterji, J., did not concur in, or dissent from, this part of the judgment.

(7) *Shaman v. Sardha* <sup>(2)</sup>, in which it was held that there was no custom in the Kangra district by which the estate of a childless proprietor escheats, on the death of his widow, to the village community, or the owners of the sub-division in which the land is situate, and that anyone suing to set aside a transfer by the widow must succeed or fail on his own title.

(8) *Sheran v. Mussammat Sharman* <sup>(3)</sup>, in which it was held that among Chamar Jats (Muhammadans) of *tahsil* Lodhran Multan, sisters were entitled in preference to collaterals descended from the great-great-grandfather of the deceased proprietor, Muhammadan law, being applicable in the absence of established custom.

(9). *Bishen Singh v. Bhagwan Singh* <sup>(4)</sup>, in which it was held that among Hindu Jats of Raipur, Ambala, sisters of a sonless proprietor were entitled to his estate in the absence of near collaterals, the parties not being governed by strict Hindu law and instances of sisters having taken having been established.

(10) *Sher v. Alam Sher* <sup>(5)</sup>, in which it was held that among Sheikh Tewanas of *tahsil* Khushab, Shahpur, a gift by a sonless proprietor of half his ancestral land to his sister's son was valid, though he had agnatic collateral heirs.

(11) *Ballu v. Gur Dyal* <sup>(6)</sup>, in which it was held that, among Ghirths of Tika Boneher of the village of Baldhar, Kangra, a childless male proprietor could bequeath land to his sister's son who had rendered service to him, and that the legatee could not be ousted by owners of the Tika who were not in any way related to the testator.

(12) *Chiragh Bibi v. Hassan* <sup>(7)</sup>, in which it was held that among Ghelna Arains of the Lahore District a

(1) 5 P. R. 1895.

(4) 28 P. R. 1904.

(2) 61 P. R. 1898.

(5) 94 P. R. 1905.

(3) 117 P. R. 1901.

(6) 95 P. R. 1905.

(7) 19 P. R. 1906.

daughter was by custom entitled, if heir to her father, to contest an alienation of his estate by his widow, her step-mother, and that where both males and females succeed, *aulad* includes both.

(13), *Lahori v. Radho* (1), in which it was held that among Ghirths of Kangra a widow was entitled to succeed collaterally to any property, to which her husband could have succeeded, and that a widow so entitled could contest an alienation made by the widow of a collateral. The judgment ran —“ It would, we think reduce the plaintiff's “right of inheritance to a mere farce if it were held that in “this suit she is not competent to question the mortgage set “up by the defendants.” Succession being reciprocal alienating widow could have succeeded to the suing widow, and it was not suggested that the suing widow had more than a widow's estate.

(14) *Gurditta v. Jai Singh* (2), in which Rattigan, J. held that among Thakar Rajputs of the Dada Siba Jagir, Kangra, a custom entitling a sister's son to inherit, in preference to the *jagirdar ala malik* had not been established.

As remarked by the learned Divisional Judge, no reference was made in this judgment to *Ballu v. Gur Dyal* (3) above cited, and moreover the learned Judge found that the record contained no evidence in support of the custom set up.

(15) *Sawan v. Sahib Khatun* (4), in which it was held that among Panwars of *mauza* Bhotapir, *tahsil* and district Muzafargarh, a sister succeeds to ancestral property in preference to the collaterals in the fifth degree of her deceased brother.

(16) Section 24, Rattigan's Digest, to the effect that sisters are usually excluded.

(17) Section 59, Rattigan's Digest, to the effect that a proprietor can alienate ancestral immoveable property at pleasure if there is, at the date of alienation, neither a male descendant nor a male collateral in existence.

(18) Section 64, Rattigan's Digest, to the effect that a female in possession of immoveable property acquired from her husband, father, grandfather, son or grandson, otherwise than as

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(1) 72 P. R. 1906.

(2) 72 P. R. 1907.

(3) 95 P. R. 1905.

(4) 44 P. R. 1909.



a free and absolute gift cannot ordinarily alienate it permanently.

(19) Roe's and Rattigan's Tribal Law, page 140, to the effect that in Kangra the right of daughters to succeed as heirs is nowhere recognised under any circumstance.

(20) Kangra Settlement Report of 1865—1872, page 103, to the effect that Sapindas only, except among Gaddis and Kanets, can object to a gift by a sonless proprietor to his daughter.

(21) Civil Appeal No. 1357 of 1898, unreported, in which it was held, in a suit among Brahmins of *tahsil* Palampur, Kangra, that the record contained no evidence on which a succession so unusual as that of a sister's son could be decreed; and that neither the Kangra Settlement Report nor any other authority were in favour of it.

(22) Civil Appeal No. 733 of 1901, unreported, in which it was held that among Hindu Rajputs of Kangra Tashil daughters succeeded to their fathers' self-acquired property in preference to collaterals.

(23) Civil Appeal No. 1424 of 1907, in which it was held that among Suds of Kulu, whether governed by Hindu law or by custom, daughter's sons inherit in preference to nephews and grandnephews.

On remand by the Lower Appellate Court 2 instances were proved. In one of these a sister was allowed by the reversioner to inherit as long as she remained single. In the other sisters inherited in default of all heirs. The latter instance alone is directly in point.

The pleader for the respondents contended that in the latter case the estate consisted of 3 *kanals* of *barani* land only, and that it was not of sufficient value for the Crown to claim.

In this case there is an absolute absence of agnate collaterals and such absence is so uncommon that instances of the succession or exclusion of sisters under these circumstances are naturally very infrequent, but it is significant that no instance of the exclusion of a sister by the Crown or by village proprietors has been established, except in so far as *Gurditta v. Jai Singh* <sup>(1)</sup> is an authority, the finding being that in that particular case the burden of proving that a sister's son was an heir had not been discharged.

The Divisional Judge who found in that case that the burden of proof had not been discharged is the Divisional Judge

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<sup>(1)</sup> 72 P. R. 1907.

who has found in this case, concurring with the Court of first instance, that the burden of establishing the sister's right to inherit after the widow has been discharged, and, in our opinion, the finding must be maintained, the weight of authority and of evidence being in favour of it. The second branch of the question, whether the sister can restrain the widow's dealings with the property must, in our opinion, be answered in the affirmative. *Chiragh Bibi v. Hassan* (1) and *Lahori v. Radho* (2) are directly in point, and we concur in the reasons recorded in the extract from the latter case above cited for holding that the sister is not deprived of the right to protect her reversionary interest, usually inseparable from such interest, merely by reason of the fact that she is entitled under exceptional circumstances only, viz., on failure of all male collaterals.

The *ratio decidendi* in *Mussammatt Rakhi v. Mussammatt Fatima* (3) was that the sister had failed to prove that she could inherit in the presence of collaterals except with their consent, and there is consequently no real conflict between that decision and *Chiragh Bibi v. Hassan* (1) in which, as above stated, it was held that a female entitled to inherit is included in *aulad*. For these reasons we hold that the sister was entitled to the declaration sought by her and we decree the appeal and restore the decree of the Court of first instance.

The purchasers—respondents will pay the appellants costs of all Courts.

*Appeal allowed.*

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### No. 61.

*Before Hon. Mr. Justice Scott-Smith.*

FAZAL ILAHI—(PLAINTIFF),—APPELLANT,

*Versus*

HABIB BAKHSII AND OTHERS—(DEFENDANTS)—  
RESPONDENTS.

Civil Appeal No. 949 of 1917.

*Execution of decree—Joint decree for possession of immoveable property—Devolution of right upon judgment-debtor by inheritance decree extinguished pro tanto—Execution by one of several decree-holders.*

*Held*, following *Khudhai v. Sheo Dayal* (4) that where subsequent to a decree a portion of the right to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor or is acquired by

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(1) 19 P. R., 1906.  
(2) 72 P. R. 1906.

(3) 89 P. R. 1892.  
(4) (1888) L. L. R., 10 All. 570.

him under a valid transfer, the decree does not become incapable of execution but is extinguished only *pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

*Held* also, following *Harrish Chunder Chowdhry v. Kali Sunderi Debi* (1), that a co-plaintiff can obtain execution according to the extent of his interest in the decree and that there is nothing in the former Code of Civil Procedure which bars such an application.

*Miscellaneous first appeal from the order of Lala Damodar Das, B. A. District Judge, of Delhi, dated the 19th July 1907.*

Chuni Lal, for appellant.

Balwant Rai, for respondent

The judgment of the learned Judge was as follows :—

SCOTT-SMITH, J.—The facts of this execution case are not very fully stated in the judgment of the learned District Judge. The original decree-holder was Mussammat Fakhrun-nisa; and the judgment-debtors were Rahim Bakhsh, Rahman Bakhsh, Qadir Bakhsh, Habib Bakhsh and others. The decree was for one-fourteenth share of the property of Karim Bakhsh, deceased. Mussammat Fakhrun-nisa died, and the following persons were entered upon the record as her legal representatives :—

Ahmad Bakhsh (decree-holder's husband),

Habib Bakhsh (brother), and

Mussammat Shams-un-nisa and Allah Bandi (her sisters).

Subsequently Mussammat Allah Bandi died; and the present appellant, Fazal Ilahi, her husband, is one of her heirs under the Muhammadan law. He applied for execution of the decree against Habib Bakhsh alone, one of the judgment-debtors. The Lower Court has rejected Fazal Ilahi's application on the ground that he has a smaller share in the estate of the deceased, Mussammat Fakhrun-nisa, than Habib Bakhsh has, and that the other decree-holders also do not join him.

We have in this case the curious position that Habib Bakhsh is a decree-holder as well as one of the judgment-debtors. This fact, however, does not prevent execution of the decree as against him. *Khudhai v. Sheo Dayal* (2) is an authority for the proposition that where subsequent to a decree a portion of the rights to which the decree relates devolves either by inheritance or otherwise upon the judgment-debtor or is acquired by him under a valid transfer, the decree does not become incapable of execution, but is extinguished only

5th May 1910.

(1) (1882) L. R., 9, Cal. 482 P. C. (2) (1888) L. L. R. 10, All. 50.



*pro tanto*. This rule of law is sufficiently general to comprehend alike cases in which the decree is for money only and where it is for immoveable property.

Mr. Balwant Rai, for the respondents, contends that the order of the Lower Court is one under section 231 of the former Civil Procedure Code, and that no appeal lies from such an order. In *Lakshmi Ammah v. Ponnassa Menon* <sup>(1)</sup>, it was held that an appeal did lie from such an order, it being one relating to execution of decree within the meaning of section 244. Mr. Balwant Rai cites on the other side *Ratan Lal v. Bai Gulab* <sup>(2)</sup>, in which the ruling in 17 Mad. was distinguished. I should be disposed to follow the 17 Mad. ruling but the decision on the point is not very material, as I consider that the order of the Lower Court was not one under section 231, Civil Procedure Code. That section refers to cases where a decree is passed jointly in favour of more persons than one; and one or more of such persons apply for execution of the whole decree for the benefit of them all. In the present case Fazal Ilahi does not apply for execution of the whole decree for the benefit of all the decree-holders. He only asks for execution of the decree so far as his ascertained share is concerned. The Privy Council held in the case reported as *Hurrish Chunder Chawdhry v. Kali Sunderi Debi* <sup>(3)</sup>, that a co-plaintiff could obtain execution "according to the extent of her interest in the estate." I can find nothing in the former Code of Civil Procedure which bars such an application as the present, and the Privy Council ruling quoted above is in support of it. Mr. Balwant Rai also urged that before Fazal Ilahi is allowed to execute the decree he should pay a share of Mussammat Fakhr-un-nisa's debts. This would appear to be a matter between him and that lady's creditors, as it is not alleged that the respondent has paid off any such debts. I therefore hold that Fazal Ilahi is entitled to execute the decree against Habib Bakhsh, and I set aside the order of the Lower Court and remand the case that it be proceeded with according to law. It will be necessary to ascertain whether Habib Bakhsh is in possession of more than his proper share of the property of the deceased Mussammat Fakhr-un-nisa, for it is admitted on behalf of the appellant that if he is not in possession of more than his share, then Fazal Ilahi is not entitled to any relief from him.

<sup>(1)</sup> (1893) I. L. R. 17, Mad. 394.

<sup>(2)</sup> (1899) I. L. R. 23, Bom. 623.

<sup>(3)</sup> (1882) I. L. R. 9 Cal. 482. P. C.

The costs of this appeal will be borne by the respondents.  
Pleader's fees Rs. 20.

*Appeal allowed.*

**No. 62.**

*Before Hon. Mr. Justice Shah Din and Hon. Mr.  
Justice Williams.*

**SOHNU AND OTHERS—(PLAINTIFFS)—APPELLANTS,**

*Versus*

**LABHA AND OTHERS—(DEFENDANTS)—RESPONDENTS.**

Civil Appeal No. 1446 of 1908.

*Limitation—Punjab Limitation Act, I of 1900—Suit for possession by collaterals after the death of widow but more than 12 years after the alienation of it by the last male owner.*

*Held following Miran Bakhsh v. Ahmad* <sup>(1)</sup> and distinguishing *Khiali Ram v. Gulab Khan* <sup>(2)</sup> that a suit for possession of land instituted in 1908 after the death of the widow of the last male owner by reversioners who had previously obtained a declaratory decree in respect of the gift by her, was not governed by the provisions of the Punjab Limitation, Act, I of 1900 and was not barred by efflux of time, mutation in favour of the defendants having taken place on the basis of the gift in 1883, and the last male owner having died in 1886.

*Further Appeal from the decree of B. H. Bird, Esquire, Divisional Judge, Hoshiarpur Division, dated the 17th June 1907.*

Sukh Dial, for appellants.

Sohan Lal, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—This appeal has arisen out of a suit brought 18th Feb. 1910. by the plaintiffs for possession of 44 kanals, 4 marlas of land, which was gifted to the defendants by one Bikhari, whose collaterals the plaintiffs are, in 1881. Bikhari died in 1886, and left him surviving a widow Mussammat Rasmon, who admittedly died about seven months before the institution of the suit. The gift related only to a part of the land owned by Bikhari, on whose death Mussammat Rasmon succeeded on the usual life estate to the rest of his property. Mussammat Rasmon mortgaged a portion of the land in her possession to a third party; the plaintiffs contested the validity of the mortgage and obtained a declaratory decree protective of their rights of reversion.

Since Bikhari was succeeded by his widow Mussammat Rasmon, admittedly the plaintiffs could not during her lifetime bring a suit for possession of the land which formed the

<sup>(1)</sup> 145 P. R., 1907.

<sup>(2)</sup> 70 P. W. R., 1908, F. B.

subject of the gift to the defendants in 1881 and the present suit has therefore been brought after the death of the widow on the ground that by custom applicable to the parties Bikhari had no power to make the gift in question in derogation of the reversionary rights of the plaintiffs. The sole question which we have to decide in this appeal is whether the suit is governed by the provisions of the Punjab Limitation Act, I of 1900, and is barred by efflux of time, mutation in favour of the defendants having admittedly taken place on the basis of the gift in dispute in 1883.

The question is concluded by the decision of this Court reported as *Miran Bakhsh v. Ahmad* <sup>(1)</sup>, in which the point of limitation, which arose under circumstance similar to those of the present case, is fully discussed; and after hearing the respondents' pleader at some length, we see no cogent reason to dissent from that decision, which, moreover, has been followed in several subsequent Division Bench cases (see among others, Civil Appeal No. 142 of 1908, decided on 20th April 1909, and Civil Appeal No. 767 of 1908, decided on 11th May 1909).

The respondents' pleader contends that the ruling in *Miran Bakhsh v. Ahmad* <sup>(1)</sup>, is erroneous, and in support of that contention he relies on the Full Bench case of *Khiali Ram v. Gulab Khan* <sup>(2)</sup>, (Civil Appeal No. 348 of 1905) decided on 15th December 1906. But that case is clearly distinguishable both as regards the facts and the law, applicable, as appears from the judgment of the Full Bench delivered by Mr. Justice Rattigan. The view of limitation taken by the learned Judge in connection with the concrete example given by him in the fourth paragraph of that judgment would seem to help the respondents, but it was no more than an *obiter dictum* for the purposes of the case before the Full Bench, and cannot prevail as against the considered decision of the Division Bench in *Miran Bakhsh v. Ahmad* <sup>(1)</sup>, which was subsequent in point of time, and to which the same learned Judge was a party. The mortgage by Rustom Khan in the Full Bench case was one without possession; and it was rightly held, in accordance with the ruling in *Devi Ditta and others v. Pareman and others* <sup>(3)</sup> that a suit for a declaration that that mortgage was void except for the lifetime of the mortgagor, would long since have been barred under Punjab Act, I of 1900, at the time when the suit was brought to control

<sup>(1)</sup> 145 P. R., 1907.

<sup>(2)</sup> 70 P. W. R., 1908, F. B.

<sup>(3)</sup> 71 P. R., 1898.



the sale by the widow of Rustom Khan, part of the consideration of which was the mortgage in question. The Full Bench case therefore in no way helps the respondents.

We accordingly hold that the plaintiffs' suit is within limitation, and accepting the appeal, we set aside the decree of the lower Appellate Court and remand the case for decision on the merits.

The stamp in the appeal will be refunded; and the other costs will be costs of the cause.

*Appeal accepted.*

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No. 63.

*Before Hon. Mr. Justice Johnstone*

BISHEN DAS AND OTHERS—(PLAINTIFFS)—APPELLANTS,

*Versus*

RAM DHAN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1231 of 1909.

*Custom alienation—Alienation of ancestral property—Brahmins of Ajnala, District Amritsar.*

*Held*, that the parties to the suit, Brahmins of Ajnala, District Amritsar, whose family for the most part lives, and has lived in past generations by agriculture and has given up priestly functions, follow agricultural custom and not Hindu law, and can therefore contest a transaction which was in effect an unauthorized and unlawful, alienation of ancestral property.

*Further appeal, from the decree of W. N. LeRossignal, Esquire, Divisional Judge, Amritsar Division, dated on the 8th March 1909.*

Duni Chand, for appellants.

Vaughan, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In this case, which has been admitted as a 16th April 1910, further appeal under clause (b), the only question is whether these Brahmins follow custom or Hindu law. The first Court in its return to the remand gave in my opinion excellent reasons for the view that they follow custom, inasmuch as the family for the most part lives, and has lived in past generations, by agriculture, has given up priestly functions and its members do not wear their hair as Brahmins do.

Ordinarily one most important test is whether the Brahmins in question are a compact village community or at least

a compact section of the village community. In such cases there is a strong presumption in favour of custom, but this condition has not been shown to exist here. But there are other indications which lead to the same result, such as those found to exist here by the first Court *cf.* :—*Gopal Singh v. Sukha Singh*<sup>(1)</sup> *Nanak Chand v. Basheshar Nath* <sup>(2)</sup>, *Dalo v. Mohlu* <sup>(3)</sup>.

The case quoted by Mr. Vaughan, *Moti Ram v. Sant Ram* <sup>(4)</sup> does not help his client in the least, for in it the Brahmins, though they happened to hold land, really lived by the offerings of their *jujmans* and had not ceased to be priests.

It is true that plaintiffs at present are engaged in occupations other than agriculture, but their uncle and grandfather both tilled the soil.

On the whole I agree with the first Court and find that these Brahmins as a fact follow custom. It follows from this that they can on the usual grounds contest a transaction between Teja Singh and his father-in-law, which was a mere trick and which in effect was an unauthorized and unlawful alienation by Teja Singh of ancestral property. The proper order, then, is to allow the appeal and give plaintiffs a decree declaring that the house is not liable to attachment by Ram Dhan for the debt of Teja Singh (who is dead).

Respondent will pay appellants costs throughout.

*Appeal allowed.*

#### No. 64.

*Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Williams.*

**HARDAM SINGH AND ANOTHER—(DEFENDANTS)—  
APPELLANTS,**

*Versus*

**MUSSAMMAT MAHAN KAUR—(PLAINTIFF)—RESPONDENT.**

Civil Appeal No. 528 of 1909.

*Custom succession—Widow marrying her husband's brother—Succession to her late husband's estate in presence of his brother Hindu Sikh Jats of Ferozepore District.*

*Held following Mussammat Jai Devi v. Harnam Singh* <sup>(5)</sup>, and *Mussammat Desi v. Lehna Singh* <sup>(6)</sup>, that among Hindu Sikh Jats of Ferozepore District a widow having remarried her husband's brother no longer remains the widow of her first husband, and consequently after the death without

<sup>(1)</sup> 58 P. R., 1906.

<sup>(2)</sup> 3 P. R., 1908.

<sup>(3)</sup> 87 P. R., 1909.

<sup>(4)</sup> 103 P. R., 1902.

<sup>(5)</sup> 117 P. R., 1888.

<sup>(6)</sup> 46 P. R., 1891, F. B.

issue of her first husband's son she cannot succeed to a life interest in her deceased husbands' estate in preference to his brothers—

*Punjab Singh v. Mussammat Chandi* <sup>(1)</sup>, and *Mussammat Indi v. Bhany Singh* <sup>(2)</sup> distinguished.

*Further appeal from the decree of H. Scott-Smith, Esquire, Divisional Judge, Ferozepore Division, dated the 18th December 1908.*

Beni Pershad, for appellants.

Durga Das, for respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—The case has been referred to a Divisional Bench by an order of 17th August last of a Judge in Chambers. A man died leaving a widow and a son. The latter succeeded to his estate and the widow, his mother, married her late husband's brother by *karewa*. Then the son died without issue and the land in suit was mutated in favour of his brothers, including her second husband, whereupon she has sued them on the ground that she takes a life-estate before them. Both the Lower Courts have found in her favour on the strength of *Mussammat Indi v. Bhanga Singh*, <sup>(2)</sup> and the defendants (except the said second husband) have come up here on revision, the petition being admitted under clause (b), section 70 (1), Courts Act, as an appeal.

In our opinion the decision of the Courts below is unsound. We have read and considered several rulings which bear on the question of the effects of remarriage on a widow's rights. We recognise the validity of the distinction pointed out by Mr. Beni Pershad Khosla between refusing to let a widow succeed and ousting her after she has succeeded. This distinction has been explained in *Fatteh Singh v. Kalu* <sup>(3)</sup> (an unchastity case.) But the important cases are those relating to re-marriage. *Heera Singh v. Sobha* <sup>(4)</sup> and *Mussammat Roopan v. Hakim Singh* <sup>(5)</sup> were both cases decided upon Hindu law, with no reference to Punjab custom, and they are thus of no value here. In them, in circumstances like the present, the widowed mother who had remarried, did succeed. In *Mussammat Jai Devi v. Harnam Singh* <sup>(6)</sup> it was held that among Sus Jats of Hoshiarpur the widow does not in these circumstances succeed in preference to near agnates.

(1) 88 P. R. 1900.

(2) 115 P. R. 1900.

(3) 107 P. R. 1888.

(4) 11 P. R. 1870.

(5) 87 P. R. 1870.

(6) 117 P. R. 1888.



There also the widow married her deceased husband's brother, and the decision was based not on specific instances but on opinions of witnesses and general principles.

In *Mussammatt Ramon v. Baisakha Singh* <sup>(1)</sup>, a case of Hindu Jats of Moga, a widow, who had remarried her first husband's first cousin, forfeited her first husband's estate.

In *Mussammatt Desi v. Lehna Singh* <sup>(2)</sup> it was laid down *inter alia* that a widow, having remarried, no longer remains widow of her first husband, and it was held in circumstances very like the present, except that the remarriage was not to a brother-in-law, that the widow could not succeed even against distant collaterals.

In *Mussammatt Indi v. Bhanga Singh* <sup>(3)</sup> relied upon by the Courts below, and also in *Punjab Singh v. Mussammatt Chandi* <sup>(4)</sup> the widow had taken the estate and then remarried. These cases are of Sikh Jats of the Ferozepore and Sirsa Districts, respectively; and if the facts had been as in the case before us, also a Ferozepore case, we might have felt constrained to follow them. But as matters stand we approve of *Mussammatt Jai Devi v. Harnam Singh* <sup>(5)</sup> and *Mussammatt Desi v. Lehna Singh* <sup>(2)</sup>.

On the record we find three precedents contained in judgments of Courts. In the two cases decided on 29th March 1906 and 26th November 1901, respectively, the widow had succeeded and then had married her brother-in-law, these two therefore, are on the same footing as the two P. R. cases of 1900 quoted above. The third precedent is in favour of plaintiff, being a judgment by a second class Munsif, dated 20th June 1906, never appealed against. It was decided on the erroneous ground that the existence of a son, who had succeeded his father, made no difference. Such a precedent is of no value whatever.

For these reasons we accept the appeal and set aside the lower Courts' judgments and decrees and dismiss plaintiff's suit with costs throughout.

*Appeal allowed.*

<sup>(1)</sup> 90 P. R., 1889.

<sup>(3)</sup> 115 P. R., 1900.

<sup>(2)</sup> 46 P. R., 1891 F. B.

<sup>(4)</sup> 88 P. R., 1900.

<sup>(5)</sup> 117 P. R., 1888.

## No. 65.

*Before Hon. Mr. Justice Johnstone.*

PAL SINGH—(DEFENDANT)—APPELLANT,

*Versus*

BUR SINGH AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 517 of 1909

*Custom alienation—necessity—childless proprietor borrowing money with a view to entering the army and for marriage—Lender's duty to see to application of the money.*

*Held*, that a mortgage of ancestral land by a childless proprietor for his intended marriage and to enable him to enlist in a cavalry regiment though neither purpose is effected but steps are taken towards both is binding on the reversioners and constitutes necessity and that in such cases the lender having made enquiry and found that the money was really required for the purposes stated is not bound to see what the mortgagor actually does with the money.

*Further appeal from the decree of W. A. LeRossignal, Esquire, Divisional Judge, Amritsar Division, dated the 1st March 1909.*

Shadi Lal, for appellant.

Beni Pershad, for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—The facts (or allegations) need not be repeated 9th Nov. 1909. here as they are set forth adequately in the judgments of the Courts below. The question for decision is whether the mortgage by Devia in favour of Dewa Singh for Rs. 700 was for consideration and “necessity.” Both Courts are agreed that consideration passed in full and on this point there can be no doubt, indeed no argument on the point was addressed to me. As regards “necessity” the first Court found for defendant, who is the minor son of the deceased original mortgagee, but instead of dismissing the suit, which was not a suit for redemption, it granted plaintiff a decree for possession on payment of Rs. 700.

The lower Appellate Court on the other hand, found only Rs. 300, on account of expenses for Devia's projected marriage, legitimate, and disallowed the rest, thus giving possession on payment of Rs. 300 only.

Defendant lodges this further appeal, urging that the whole was for “necessity” and plaintiffs file cross-objections in regard to the condition of payment of Rs. 300 only.

After hearing arguments and examining the record, I have arrived at the conclusion that defendant must succeed.

In the first place. I can find no motive for the mortgage which would make it liable to be contested by plaintiffs. At the date of the mortgage Devia was living with plaintiffs and their father and was presumably on good terms with them, and there is really no proof that Devia was a man of immoral life, much less that he actually borrowed this money for immoral purposes or by way of reckless extravagance or wanton waste cf. *Devi Ditta v. Sandagan Singh* (1). Secondly, the two reasons for borrowing are natural and proper enough—Devia's intended marriage and his project of enlisting in a cavalry regiment. Neither purpose was effected; but, notwithstanding the denial of the girl's father, I am satisfied that Devia did take the preliminary steps towards carrying out each: his applying for enlistment in a regiment, which would necessitate his being ready with some hundreds of rupees for his horse, etc., is proved beyond doubt, and the agreement with Wasawa Singh or the *farigh khati* (or whatever it should be called) on the file makes it clear that Devia did begin negotiations about marrying the girl and spent some money over it. From the point of view of the lender Dewa Singh the question is not what Devia actually did with the money, but whether Dewa Singh after due enquiry had reason to believe that Devia really intended to marry and to enlist, both of which things were natural and proper in a young man of 25. I see no reason to doubt his *bonâ fide* belief: unfortunately he is not here to explain matters and defendant is a little boy and cannot explain. Devia's general good faith is clear from the undoubted fact that, when the enlistment project fell through, he spent the money on agricultural cattle, which are now in the possession of plaintiffs. The Divisional Judge makes a curious mistake when he says the cattle bought by Devia are not traced; the Munsif on remand rightly remarks that plaintiffs' guardian admits that plaintiffs have got these cattle.

The question about the outstandings ground 2—need not be discussed; it is quite beside the mark.

I dismiss the cross-objections and accept the appeal. I would like to dismiss plaintiffs' suit in accepting defendants' appeal, but I cannot do this inasmuch as defendant did not appeal against the first Court's decree. I merely accept defendant's appeal, set aside the decree of the lower Appellate Court and restore that of the first Court, and direct that plaintiffs do pay defendant's costs throughout.

*Appeal allowed.*

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(1) 65 P. R., 1900.



## No. 66.

Before Hon. Sir Arthur Reid Kt. Chief Judge,  
and Hon. Mr. Justice Ryves.

NABI BAKHSH—(DEFENDANT)—APPELLANT,

Versus

RAM JAWAYA—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 503 of 1909.

*Indian Oaths Act X of 1873, section 8—Form of oath—affecting third person—consent to abide by statement on oath—Competency of Court to administer such oath.*

Where the oath administered to the Defendant was in these terms "If I lie in saying that I did not strike the balance and had paid the debt may my wife be considered to have been divorced from me."

Held following *Ruldu Mal v. Bhupa* <sup>(1)</sup>, and dissenting from *Ram Narain Singh v. Babu Singh* <sup>(2)</sup> that the oath was repugnant to decency, purported to affect a third person and was in contravention of section 8 of the Indian Oaths Act 1873, and that the fact that the Defendant accepted and took the oath did not validate it or create a bar to any objection by the Plaintiff in as much as the Court was not competent to tender the oath to the Defendant and was consequently barred from accepting the evidence, so sworn.

*Further appeal from the decree of Khan Bahadar Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 15th March 1909,*

Fazal Ilahi for Appellant.

Duni Chand for Respondent.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—The question for decision is whether the Lower Appellate Court, was right in remanding the suit on the ground that the oath taken by the defendant appellant was in contravention of the terms of section 8 of the Oaths Act X of 1873, and that the statement on that oath did not conclude the case. The oath, dictated by the plaintiff-respondent was in these terms. "If I lie in saying that I did not strike the balance and had paid the debt may my wife be considered to have been divorced from me." 30th May 1910.

This is a far stranger case than those reported in *Ruldu Mal v. Bhupa* <sup>(1)</sup> and *Ram Narain Singh v. Babu Singh* <sup>(2)</sup> in which the oath was taken while the person taking it had his hand on

<sup>(1)</sup> 36 P. R. 1873.

<sup>(2)</sup> (1896) I. L. R. 18 All 46.

his son's head or arm, and we have no hesitation in holding that the oath was repugnant to decency and purported to affect a third person.

We see no reason for holding, as was held in the Allahabad case that the acceptance by the defendant and his taking the oath dictated by the plaintiff validated the oath though obviously in contravention of section 8, and created a bar to any objection by the plaintiff. The Court was not competent to tender the oath to the defendant and was consequently barred from accepting the evidence of the defendant so sworn and it was not a case of mere repudiation by the plaintiff.

The course adopted in *Ruldu Mal v. Bhupa* <sup>(1)</sup>, was, in our opinion, the correct course and we dismiss the appeal with costs.

*Appeal Dismissed.*

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**No. 67.**

*Before Hon. Sir Arthur Reid Kt. Chief Judge and Hon.  
Mr. Justice Ryves.*

MUSSAMMAT BHAGAN AND OTHERS—(DEFENDANTS)—  
APPELLANTS,

*Versus*

JAHANA AND ANOTHER—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 566 of 1908.

*Custom Alienation—Gift of ancestral land by a childless proprietor in favour of his sisters—contest by the reversioners of the donor—Onus pro bandi Dhamrayas of Shahpur District.*

*Held*, that among Dhamrayas—a small endogamous agricultural tribe of the Shahpur District—the collateral reversioners of the donor are entitled to obtain a declaration that a gift of the whole of his ancestral land by a childless proprietor to his sisters shall not affect their reversionary rights after the death of the donor—And that the *onus* of proving the validity of the gift was on the sisters who failed to discharge it.

*Further appeal from the decree of M. L. Waring, Esquire, Additional Divisional Judge, Shahpur Division, dated the 14th March 1908.*

Muhammad Shafi for Appellants.

Lal Chand for Respondents.

The judgment of the Court was delivered by—

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<sup>(1)</sup> 36 P. R. 1873.

SIR ARTHUR REID C. J.—The parties are *Dhamrayas*, a small endogamous Agricultural tribe, of the Shahpur District. The Lower Appellate Court has recorded that this tribe admittedly falls under the head of miscellaneous Musalmans. The question for consideration is whether the collateral reversioners of subhana are entitled to a declaration that a gift of the whole of his ancestral land to his sisters does not affect their reversionary rights. A mass of authority was cited by counsel for the appellants, the sisters, in an endeavour to establish the proposition that *Dhamrayas* have been absorbed in the Awan tribe and have adopted Awan customs or are governed by Mohammedan Law.

3rd June 1910.

Not a scrap of evidence of this absorption has been cited and no instance of a gift to a sister in this tribe having been maintained or allowed is forthcoming.

Reliance was placed on a gift among *Talokars* of the same village to a wife's brother's son, but that was maintained on the ground that a donee had been adopted, and as much of the gift as was to a wife's brother's son, not adopted, was set aside.

The decisions of this Court have not placed sisters on the footing occupied by daughters under the ordinarily prevailing customary law and the distinction was emphasised in *Hamira v. Ram Singh* (1). A Division Bench ruled as follows, in *Bholi v. Fakir* (2), at p. 229. "In every case therefore, when the parties are agriculturists and the property concerned is ancestral and immovable, the Court is in our opinion, bound to assume at this stage of the case, and before any evidence is tendered as regards the power of alienation, that an alienation of such property is invalid"—

This is, in our opinion, a sound exposition of the law applicable and is not opposed to the ruling of the Full Bench in *Daya Ram v. Soheli Singh* (3), that among parties generally following customary law it is permissible to fall back, as a last resort, on their personal law for the decisions of the point in issue, when no definite rule of the former law applicable to the case before a Court can be found.

The parties reside in a village in the Shahpur District which although not geographically in the centre of the Punjab, is

(1) 134 P. R. 1907, F. B.

(2) 62 P. R. 1906.

(3) 110 P. R. 1906, F. B.



separated by other districts from the frontier and is separated by one district only from the Lahore District. No evidence of their being governed by Mohammedan Law has been adduced. We have no hesitation in holding that the burden of proving the validity, against the collaterals, of the alienation was on the sisters, who have failed to discharge it.

As remarked in *Bholi v. Fakir* <sup>(1)</sup> the referring order of Plowden S. J. in *Ramji Lal v. Tej Ram* <sup>(2)</sup> is in point.

The record of rights does not help the sisters, and answer 12, at p. 73 of Wilson's customary law of the Shahpur District, relied on for them, is not supported by any instance, and the persons in the compilers mind were obviously Awans. The note on page 72 of the same work, as to gifts by miscellaneous Mohamedans, shows how valueless mere records of opinions as to custom, without instances, are.

It would be a waste of time to criticise in detail the authorities cited by counsel of the appellants. Most of them deal with other tribes and cases supported by instances, and the attempt to apply, by analogy to the parties to the present suit, the rules therein laid down has, in our opinion failed.

The appeal fails and is dismissed with costs.

*Appeal Rejected.*

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### No. 68.

*Before Hon. Mr. Justice Johnstone,*

**KHUDA BAKHSH AND OTHERS—(DEFENDANTS)—  
PETITIONERS,**

*Versus*

**SHAMAS AND OTHERS—(PLAINTIFFS)—RESPONDENTS.**

Civil Revision No. 179 of 1910.

*Custom—Alienation—Bequest of ancestral land by a childless proprietor in favour of sister's sons—Validity of—Kahuts of tahsil Chakwal, District Jhelam.*

*Held*, that among Kahuts of tahsil Chakwal, District Jhelum, a bequest of ancestral land with the consent of his brother by a childless proprietor in favour of his sister's sons who were agnatically related to the testator in the fifth degree and who had rendered services to him, is valid by custom.

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<sup>(1)</sup> 62 P. R. 1906.

<sup>(2)</sup> 73 P. R. 1895, F. B.

*Petition under section 70 (a) and (b) of Act XVIII of 1884 as amended by Act XXV of 1899 for revision of the order of W. Malan, Esquire, Additional Divisional Judge, Jhelum Division, dated the 17th April, 1909.*

Duni Chand, for petitioners.

Fazal Ilahi, for respondents.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In this case plaintiffs, who are Kahuts of *tahsil Chakwal*, District Jhelum, sue for a declaration that a certain will shall not affect their reversionary rights. That will was executed by one Samand, their collateral in the third degree, and it was executed in favour of two defendants (Nos. 1 and 2), his sister's sons and also agnatically related to him in the fifth degree. Haidar, brother of deceased, Samand, is still alive, but he assented to the will, though the land dealt with is ancestral.

The first Court framed issues and held a regular enquiry and concluded that custom was in favour of defendants 1 and 2, and that the will was valid. The suit having been thus dismissed, plaintiffs appealed with the result that the suit was in the end decreed.

Defendants 1 and 2 have come up here on revision, and I have admitted the petition because, in my opinion, the question of custom is an important one and has been wrongly decided.

I have, with the learned counsel, gone through the evidence on the record and the instances there given. There are at most two cases of wills or gifts to sister's sons in which the alienation was upheld, but then there are no cases to the contrary. The daughter's sons' cases and the son-in-law cases are not directly in point, though they are numerous and perhaps go to shew indirectly that these Kahuts claim a good deal of power in dealing with ancestral land. The tribe is endogamous, and defendants Nos. 1 and 2 are, though sister's sons, collaterals only two degrees further removed than plaintiffs themselves from the testator. These things are all in favour of the legatees and of non-interference by the Courts.

And, in addition, we have two extremely important considerations, namely, Haidar's assent to the will, and the fact that defendants 1 and 2 did services to the testator, and would

have done more if unfortunately he had not died. No doubt Haidar is sonless; but he is a poor man, and I am satisfied that he consents to the will not because he has been "squared" but because he knows it is all right; and the value of such an assent as this becomes clear on a perusal of *Wali Dad v. Ala Dad* <sup>(1)</sup>, and *Mussammât Fâtteh Bibi v. Allah Bakhsh* <sup>(2)</sup>, of which the former is a Kahut case like the present.

In regard to services the lower Appellate Court finds them insufficient. The will recites that defendants Nos. 1 and 2 have served the testator in sickness and in health; and the mere fact that they only came to live in his house when he became ill some months before his death, does not negative the idea that they had served him before that. But even if they had not so far as the evidence shows, the testator was not dying when they went to the house to live, but was merely ill, and the wording of the will does not at all confirm the suggestion that he knew or thought he would die soon, but rather the contrary.

We have thus in favour of the legatees—

- (a) Haidar's *bonâ fide* assent;
- (b) services rendered;
- (c) legatees in fifth degree, only two degrees more than plaintiffs;
- (d) such cases as have occurred being all in favour of free gifts even to sister's sons.

For these reasons I allow this petition and dismiss plaintiffs' suit with costs throughout, setting aside the decree of the lower Appellate Court.

*Revision accepted.*

### No. 69.

*Before Hon. Mr. Justice Shah Din.*

MALLA *alias* MAL SINGH AND OTHERS—(PLAINTIFFS)—  
APPELLANTS,

*Versus*

MUNSHI RAM AND OTHERS—(DEFENDANTS)—RESPOND-  
ENTS.

Civil Appeal No. 285 of 1909.

*Custom alienation—Sale of house by non-proprietor—Mauza Talwandi Kalan, tahsil Jagraon, district Ludhiana—Suit for ejectment of vendee—Acquiescence by proprietors.*

<sup>(1)</sup> 72 P. R., 1900.

<sup>(2)</sup> 84 P. R., 1900.



*Held* that a custom had not been established authorising the non-proprietors of *mauza* Talwandi Kalan, *tahsil* Jagraon, District Ludhiana, to alienate without the consent of the proprietary body their right of residence in houses occupied or erected by them and that on leaving the village they were entitled merely to sell or remove the materials.

*Held* also that a proprietor by attesting the sale deed of a non-proprietor and appearing before the Sub-Registrar acquiesces in the alienation and is debarred from contesting it.

*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 29th July 1908.*

Devi Dial, for appellants.

Sheo Narain, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—This appeal arises out of a suit brought by 22<sup>nd</sup> June 1910. the plaintiffs-appellants, who are some of the proprietors of *mauza* Talwandi Kalan, *tahsil* Jagraon, district Ludhiana, for the ejectment of defendants Nos. 1 and 2 from a house situate in the said village, which has been sold to the said defendants by defendants Nos. 3 and 4, who are non-proprietors.

The sole question for decision in this appeal is whether according to the true construction of the *Wajib-ul-arz* of the village the non-proprietors have an unrestricted power of alienation in respect of their houses situate in the village *abadi*. The relevant clause in the *Wajib-ul-arz* runs as follows :—

*Jis qadar ghair malikan gaon men abad hain unka milkiyat-i-zamin-i-sakni se kuckh wasta nahin hai. Jab tak gaon men abad rahen be-dakhl nahin ho sakte. Jab chale jawen to malba makanat jo ghair malikan ne apni lagat se lagaye ho uske utha lejana ya farokht karne ka unko ikhtiyar hasil hai. Zamin sakini ke rihan bai ka ikhtiyar nahin hai.*

From a note attached to this part of the *Wajib-ul-arz* it would appear that the non-proprietors protested against the above entry and stated that a non-proprietor had full power to sell or mortgage the site under his own house. This protest is supported by five alleged instances of alienations of houses by non-proprietors, two instances being of mortgages and three of sales.

According to the Divisional Judge, the meaning of the aforesaid entry in the *Wajib-ul-arz* is that *kamins* can sell their houses as such, but that they cannot sell the sites under them. Upon this construction, the learned Judge has decreed the plaintiffs' claim against the site under the house in dispute, but has held that as regards the house itself the plaintiffs

have no right to question its sale. As to the effect of this decree, the Divisional Judge concedes that it will be of no practical value to the plaintiffs, but he says that this is the only decree that he can pass in the case, as, according to him, the plaintiffs have no right to ask the defendants to demolish the house and remove the materials, such a custom, if it existed at all, being, in the learned Judge's opinion, inequitable and opposed to public policy.

The learned pleader for the respondents is not prepared to support the view of the Divisional Judge in its entirety, and is compelled to concede that the construction placed upon the *Wajib-ul-arz* by the learned Judge is erroneous. The meaning of the *Wajib-ul-arz* is to my mind quite clear and it is this :—

So long as a non-proprietor occupies his house in the village he cannot be ejected therefrom by the proprietary body. If, however, he leaves the village or abandons the house, he is entitled to sell or remove the materials if these have not been supplied by the proprietors. In no case can the non-proprietor sell or mortgage the site under the house.

Such being the provision in the *Wajib-ul-arz*, it is, in my opinion, clear that if a non-proprietor sells a house, inclusive of the site under it, such sale is void altogether against the proprietary body and cannot hold good even as regards the materials so as to confer upon the vendee the right of residence in the house which was vested in the vendor. The non-proprietor can remove the materials if he pleases, or he can sell them to any one he likes, but in the latter case the vendee too can only remove the materials and he will have no right of residence in the house, as such right cannot be enjoyed without making use of the site as part of the house, which site the non-proprietor cannot *ex hypothesi* part with. In a case like the present, the crucial point in connection with a non-proprietor's power of alienation in respect of his house is, whether his right of residence in the house can or cannot be transferred to a third person without the consent of the proprietary body, and the *Wajib-ul-arz* in this case, like the *Wajib-ul-arzes* of most of the Punjab villages, lays down in effect that such right of residence cannot be transferred except with the consent of the proprietors. The construction placed by the Divisional Judge on the *Wajib-ul-arz* in question admittedly leads to grotesque results, and I have no doubt that that construction is erroneous.

The protest of the non-proprietors as embodied in the note attached to the *Wajib-ul-arz* has, in my opinion, no legal force, and the few instances of alienation cited by them are insufficient to prove that the custom as recorded in the *Wajib-ul-arz* does not exist in the village of Talwandi Kalan.

There is no other evidence on the record to shew that the custom set up by the plaintiffs and corroborated by the entry in the *Wajib-ul-arz* has been abrogated in this village, and I see no sufficient reason at this stage to comply with the request of the respondents' pleader to remand the case for further enquiry, as he is unable to give me an assurance that fresh light would be thrown on the question of custom involved in this case if the further enquiry prayed for were held.

It appears from the record that Malla, appellant, attested the sale-deed of the house in dispute and that he appeared before the Sub-Registrar at the time of registration. I think that this conduct on the part of Malla clearly amounts to acquiescence in the sale in question, and the suit so far as he is concerned cannot be decreed.

So far as the other plaintiffs-appellants are concerned, I accept this appeal and pass a decree in their favour for possession of the site under the house in dispute with a direction that the vendees shall remove the materials within three months from the date of this order, failing which the plaintiffs-appellants other than Malla will be at liberty to demolish the house and to take possession of the site, the vendees being then entitled to take away their materials.

Under the circumstances the parties must bear their own costs throughout.

*Appeal accepted.*

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**No. 70.**

*Before Hon. Mr. Justice Shah Din.*

SHIB DIT SINGH—(DEFENDANT)—PETITIONER,

*Versus*

DEVINDAR SINGH—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 890 of 1910.

*Probate and Administration Act V of 1881, section 86—Appeal from interlocutory order—Revision—Grounds for.*

Where upon an application being made for letters of administration under the Probate and Administration Act (V of 1881), it was objected



that the District Judge had no jurisdiction to entertain the application and that officer decided against the objection.

*Held*, that no appeal lay from the order of the District Judge under section 86 of the Act, inasmuch as the order was not one made by the District Judge by virtue of the powers expressly conferred upon him by the Act.

*Held*, also that the order being an interlocutory one on a point of jurisdiction no revision lay in the Chief Court.

*Petition under section 70 (a) of Act XVIII of 1884 as amended by Act XXV of 1899 for revision of the order of A. H. Parker, Esquire, District Judge, Lahore, dated the 8th January 1910.*

Fazl-i-Hussain and Sangam Lal, for petitioner.

Sheo Narain and Umar Bakhsh, for respondent.

The judgment of the learned Judge was as follows :—

30th June 1910.

SHAH DIN, J.—This is a petition under section 70 (1) (a) of the Punjab Courts Act for revision of the order of the District Judge, Lahore, deciding, upon the objection of the petitioner, that he had jurisdiction to entertain an application by the respondent, Devindar Singh, for letters of administration to part of the estate of the late Sardar Ranjit Singh of Patiala. For the respondent it is urged as a preliminary objection that the order in question being an interlocutory one, no revision is competent under clause (a) of section 70 (1) of the Courts Act. This objection is well founded and must prevail. The question as to whether a decision by a subordinate Court on the preliminary point of jurisdiction can or cannot be made the subject of revision in this Court, is discussed at length in the judgment of this Court in *Mahtab Rai v. Kaman Lal* <sup>(1)</sup> and following that decision I hold that no revision lies from the order complained of in this case.

The counsel for the petitioner now contends that an appeal lay in this case to this Court under section 86 of Act V of 1881, and that the petition for revision may be treated as a memorandum of appeal. After hearing arguments, I do not think that an appeal lies under the aforesaid section. Under that section an appeal lies to this Court from an order made by a District Judge by virtue of the powers conferred upon him by the Act under the rules contained in the Code of Civil Procedure applicable to appeals. Upon the analogy of

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(<sup>1</sup>) 51 P. R., 1899.

the rulings in *T. Lucas v. H. Lucas* (1), *Khettramoni Dasi v. Shyama Charan Kundu* (2), and *Gerindra Kumar Das Gupta v. Rajeshvari Roy* (3), I hold that no appeal lies to this Court from the order complained of. That order is merely an interlocutory order disposing of the objection to the jurisdiction of the Court to entertain the application for letters of administration; it is not an order made by the District Judge by virtue of the powers expressly conferred upon him by the Act, and it is not pretended that the present appeal lies under the rules contained in the Code of Civil Procedure applicable to appeal.

The revision fails and is dismissed with costs.

Pleader's fee, Rs. 32.

*Revision rejected.*

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**No. 71.**

*Before Hon. Mr. Justice Shah Din.*

CHANNAN SHAH AND OTHERS—(PLAINTIFFS)—APPELLANTS,

*Versus*

AMAR DAS AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 43 of 1909.

*Custom alienation—Alienation of self-acquired property by mother and widow of the last male owner—Locus standi of collaterals residing in another village to contest the alienation—Syads of mauza Tal Khalsa—District Rawalpindi.*

*Held, following Durga Ram v. Sohel Singh* (4), that by custom among Sayads of mauza Tal Khalsa, district Rawalpindi, collaterals of the last male owner residing in another village have a locus standi to contest a sale of self-acquired land made by the mother and widow of the deceased without legal necessity.

*Further appeal from the decree of T. J. Kennedy, Esquire, Divisional Judge, Rawalpindi Division, dated the 26th May 1908*

Parduman Das, for appellants.

Ram Bhaj Datta, for respondents.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The facts of this case are fully stated in 30th June 1910. the judgments of the Courts below.

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(1) (1893) I. L. R. 20, Cal. 245.

(2) (1900) I. L. R. 27, Cal. 5.

(3) (1894) I. L. R. 21, Cal. 539.

(4) 110 P. R. 1906 F. B.

The sole question for decision in this appeal is whether the plaintiffs, who are the collaterals of Sayed Saidan Shah and reside in the village of Dhera Pothi, have a *locus standi* to contest a sale made by defendants Nos. 1 and 2, the mother and widow, respectively, of Saidan Shah, for themselves and on behalf of defendants Nos. 3 and 4; the minor daughters of Saidan Shah, of certain land which was acquired by Saidan Shah and which is situate in the village of Tal Khalsa. The first Court has held, relying upon question and answer No. 49 of the *Riwaj-i-am* of the Rawalpindi district, that defendants Nos. 1 and 2 had no power to alienate even the acquired immoveable property of Saidan Shah without legal necessity, and that the plaintiffs have a right to contest the alienation in question. The lower Appellate Court has held the contrary view and has dismissed the plaintiffs' suit, on the ground that as they belong to the village of Dhera Pothi and have no connection with the village of Tal Khalsa, where the land in suit is situate, and as the land was the self-acquired property of Saidan Shah, it was for them to prove that they have by custom a *locus standi* to challenge the sale in dispute, and that they have failed to prove any such custom.

After hearing the pleaders on both sides, I think that the view held by the Divisional Judge is erroneous. The learned Judge, in support of his opinion, relies upon the decisions of this Court reported as *Lokha v. Hari* (1) and *Mussammat Ichhri v. Jowahira* (2). He has, however, overlooked the fact that these decisions have been fully considered in a Full Bench judgment of this Court in *Daya Ram v. Soheli Singh* (3), which lays down a rule of customary law which favours the position taken up by the plaintiffs in this case. In *Lokha v. Hari* (1) and *Mussammat Ichhri v. Jowahira* (2), was the daughter's sons and the daughter of the last male-owner, respectively, who were in possession of the land then in dispute, and the question under consideration was as to the right of the collateral to oust the daughter's sons and the daughter from possession of the last male owner's self-acquired land not situate in the village of his origin. In the present case the contest is not between the collaterals of Saidan Shah and his daughters as to their respective rights of succession to the land in suit; the sole question is as to whether the collaterals have a right to challenge a sale of the land in question by the widow and mother of Saidan Shah

(1) 64 P. R., 1893.

(2) 18 P. R., 1896.

(3) 110 P. R., 1906, F. B.



in favour of third parties, which sale will affect the collaterals' rights of reversion. The daughters are still minors and childless, and no question therefore arises as to the *locus standi* of the collaterals to impugn the sale in presence of the daughter's issue. The entry in the *Riwaj-i-am* is admittedly in favour of the plaintiffs' right to sue, and on the strength of that entry and on the authority of *Daya Ram v. Soheli Singh* <sup>(1)</sup>, I hold that the plaintiffs have proved that they have a right to impeach the sale in dispute.

I accept the appeal and reversing the decree of the Lower Appellate Court remand the case under Order XLI, rule 23, Civil Procedure Code, for decision on the merits.

The costs in this Court will abide the result.

*Case remanded.*

### No. 72.

*Before Hon. Mr. Justice Shah Din.*

GHANIA LAL—(JUDGMENT-DEBTOR)—APPELLANT,

*Versus*

POHLO MAL—(DECREE-HOLDER)—RESPONDENT.

Civil Appeal No. 1250 of 1909.

*Execution of decree—Application by judgment-debtor to set aside sale after the auction sale had taken place—Refusal of such application—Appeal—Civil Procedure Code, Act V of 1908, Order XXI, rules 83 and 89, and Order XLIII, rule (1) (j).*

*Held*, that an application made by the judgment-debtor to have a sale of immoveable property set aside after the auction sale had taken place without, at the same time, making a deposit, does not fall within the purview of either rule 83 or rule 89 of Order XXI of the Civil Procedure Code, 1908, and consequently under Order XLIII, rule (1) (j) an appeal does not lie from the order of the first Court refusing to set aside the sale.

*Miscellaneous appeal from the order of W. A. LeRossignal, Esquire, Divisional Judge, Amritsar Division, dated the 1st August 1909.*

Appellant in person.

Nand Lal, for respondent.

The judgment of the learned Judge was as follows :—

SHAH DIN, J.—The judgment-debtor's application does not fall within the purview of either rule 83 or rule 89 of Order XXI of the Civil Procedure Code. Rule 83 is not applicable, because the auction sale had already taken place, and rule 89 is equally inapplicable, because the judgment-debtor had not deposited in Court the sums specified in clauses (a) and (b) of sub-rule (1)

29th June 1910.

<sup>(1)</sup> 110 P. R. 1906, F. B.

at the time when he made his application. Such being the case, an appeal could not lie from the order of the first Court to the Divisional Court under Order XLIII (1) (j).

Even, however, if an appeal lay to the Divisional Court, none lies to this Court, as the order of the Divisional Court is in any case final. On the merits also, I agree with the view taken by the Divisional Judge. I can see no sufficient reason to interfere with the order of the first Court.

The value of the suit out of which the execution proceedings arose was below Rs. 5,000 and therefore the first ground is untenable.

I dismiss the appeal with costs.

*Appeal rejected.*

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### No. 73.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

RAHMUN—PLAINTIFF,

*Versus*

HASHAM AND OTHERS—DEFENDANTS.

Civil Reference No. 23 of 1910.

*Jurisdiction—Suit by occupancy tenant for a declaration under section 45 of the Punjab Land Revenue Act, XVII of 1887—Re-enhancement of rent.*

The plaintiffs sued under section 45 of the Punjab Land Revenue Act, 1887, for a declaration that they, as occupancy tenants under section 5 of the Punjab Tenancy Act, 1887, were not bound to pay the enhanced rent laid down by a fresh entry in the record of rights, and that such entry was erroneous.

*Held*, following *Raja Nur Khan v. Darab Khatun* <sup>(1)</sup> and dissenting from *Bahadur Khan v. Sardar* <sup>(2)</sup> that the suit was exclusively cognizable by a Civil Court,

*Case referred by Colonel H. Davies, Commissioner, Jullundur Division, with his No. 732 of 2nd March 1910.*

The judgment of the learned Judge was as follows:—

4th July 1910.

SIR A. REID, C. J.—This reference and civil reference 32 of 1910 can be disposed of together. The plaintiffs sued under section 45 of the Revenue Act for a declaration that they, as occupancy tenants under section 5 of the Tenancy Act, were not bound to pay more rent than one-tenth of the produce in respect of half the land held by them and three annas per rupee in respect of the rest of the land held by them.

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<sup>(1)</sup> 25 P. R. 1889.

<sup>(2)</sup> 89 P. R. 1895.

A Division Bench of this Court (Rattigan and Roe, JJ.) held in *Raja Nur Khan v. Mussammat Darab Khatun* <sup>(1)</sup> that a suit of this nature was exclusively cognizable by a Civil Court.

Rivaz, J., ruled in *Bahadur Khan v. Sardar* <sup>(2)</sup> that section 45 of the Revenue Act must be read with section 77 of the Tenancy Act, and the other provisions of either Act relating to the jurisdiction of the Revenue Courts, and that cases falling within the former section, are cognizable by the Civil or Revenue Court, according to the nature of the subject-matter of the suit and the rules for the exercise of jurisdiction by the Revenue Courts enacted in the relevant sections of the two Acts.

The Division Bench case above cited was not cited in the judgment and no authority was cited for the rule laid down.

The preamble of the Specific Relief Act refers to civil suits only, and no exception to this limitation is made in favour of Chapter VI of the Act.

I have no hesitation in following the Division Bench ruling and holding that the suit now in question was exclusively cognizable by a Civil Court.

For these reasons I hold that the Revenue Court had not jurisdiction.

No cause against the registration of the decree of the Court of first instance in a Civil Court with jurisdiction has been shown and such registration does not appear to be prejudicial to either side.

Under section 100 of the Tenancy Act, I order that the decree of the Court of first instance be registered in a Civil Court which has jurisdiction.

The memorandum of appeal will be returned for presentation in the Civil Appellate Court.

#### No. 74.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.  
Mr. Justice Scott-Smith.*

MUSSAMMAT MALAN—(DEFENDANT)—APPELLANT,

*Versus*

RURA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 183 of 1910.

*Custom—Succession—forfeiture of widow's estate—effect of in chastity of widow subsequent to taking possession—Somal Jats of tahsil Phillour, District Jullundur.*

*Held*, that it was not established that by custom prevailing among Somal Jats of the Phillour tahsil in the Jullundur District a widow forfeits her

(<sup>1</sup>) 25 P. R. 1889.

(<sup>2</sup>) 89 P. R. 1895.



right by reason of in chastity subsequent to taking possession of her late husband's estate.

*Further appeal from the decree of A. H. Parker, Esquire, Divisional Judge, Jullundur Division, dated the 4th June 1909.*

Beni Parshad, Khosla, for appellant.

Douglas, for respondents.

The judgment of the Court was delivered by—

9th July 1910.

SIR ARTHUR REID, C. J.—The parties are Somal Jats of the Phillour *tahsil* in the Jullundur District. The case for the plaintiffs-respondents was that the appellant, Mussammat Malan, widow of their collateral Hira, had forfeited her rights in her deceased husband's estate by remarriage or in chastity, having borne a child about  $1\frac{1}{2}$  years after Hira's death. The remarriage has been denied, and we concur with the Court of first instance in the conclusion that it has not been established. Of the in chastity there is no doubt; but the question for consideration is whether in chastity, subsequent to taking possession of the husband's estate, effects forfeiture thereof.

The authorities cited at the hearing were—

(1) *Mussammat Nur Begam v. Sadar-ud-din Khan* <sup>(1)</sup>, the parties to which were Pathans of Hoshiarpur. It was found that the widow's in chastity involved forfeiture of her deceased husband's estate.

(2) *Didar Singh v. Mussammat Dharmon* <sup>(2)</sup>, the parties to which were Jats of the Ferozepore District. It was held that a *karewa* marriage with the brother of the deceased husband did not effect forfeiture of the widow's rights in the deceased husband's estate.

(3) *Fatteh Singh v. Kalu* <sup>(3)</sup>, the parties to which were Bagri Jats of the Sirsa District. It was held that no custom, whereby a widow forfeited her estate by in chastity after the death of her husband, had been established; that there was no general custom in the Punjab by which a Hindu widow forfeited, by an act of in chastity, her husband's estate vested in her, and that in the absence of proof of a special custom, the Hindu Law applied.

(4) *Mussammat Sobhi v. Bhana* <sup>(4)</sup>, the parties to which were Utal Jats of the Ludhiana District. It was held that a

<sup>(1)</sup> 2 P. R. 1888.

<sup>(2)</sup> 25 P. R. 1889.

<sup>(3)</sup> 107 P. R. 1888.

<sup>(4)</sup> 25 P. R. 1891.

custom forfeiting for in chastity of a widow her interest in her deceased husband's estate, had been established.

(5) *Wadhawa Singh v. Mussammatt Raj Devi* <sup>(1)</sup>, the parties to which were Sikh Jats of the Amritsar District. It was held that a custom whereby a widow, who abandoned her deceased husband's household and contracted an irregular, but more or less permanent, union with another man, forfeited her life estate in her late husband's land, had been established.

(6) *Mussammatt Atri v. Didar Singh* <sup>(2)</sup>, the parties to which were Banias of Ambala town. It was held that a widow did not, by subsequent in chastity, forfeit the estate which had vested in her on her husband's death.

(7) Article 30 of Rattigan's Digest, in which authorities are cited for the rule that the subsequent in chastity of a widow sometimes causes forfeiture of her life interest in her husband's estate, but that the *onus* of establishing a custom involving forfeiture is on those who allege its existence.

For the respondents it was contended that the parties lived within ten miles of the boundary of the Ludhiana District, and that *Mussammatt Sobhi v. Bhana* <sup>(3)</sup> should be applied. The boundary is, however, the river Sutlej, and we see no reason for holding that a special custom proved to exist on one side of the boundary exists also on the other side. No instance from this district or tribe of the customary forfeiture set up and no decision establishing the custom in this tribe or district was cited. The oral evidence of the existence of a custom without any instances is, in our opinion, worthless.

For these reasons we decree the appeal, set aside the decrees of the Courts below and dismiss the suit. Parties will bear their own costs of all the Courts, the in chastity of the widow having been established.

*Appeal allowed.*

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**No. 75.**

*Before Hon. Mr. Justice Scott-Smith.*

**IMRAT LAL AND OTHERS—(PLAINTIFFS)—PETITIONERS,**

*Versus*

**LAL CHAND—(DEFENDANT)—RESPONDENT.**

Civil Revision No. 2684 of 1908.

*Indian Limitation Act, IX of 1908, Article 85—Reciprocal demands—Bahi account.*

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<sup>(1)</sup> 40 P. R. 1899.

<sup>(2)</sup> 76 P. R. 1901.

<sup>(3)</sup> 25 P. R. 1891.

I. L. and others used to supply L. C. with capital by means of *hundis* and L. C. supplied them with goods. Up to the year 1954 Sambat the balance was sometimes in favour of I. L. and sometimes in favour of L. C., but after Sambat 1951 the balance was always in favour of I. L., though I. L. went on supplying cash and L. C. in turn supplied goods. Each year the balance was ascertained and carried over, but in Sambat 1959 a regular balance was struck and signed by L. C. It was contended by L. C. that after Sambat 1954 at any rate there was no mutuality, and that article 85 of the Indian Limitation Act, IX of 1908, was therefore inapplicable.

*Held*, by the Chief Court that the suit was governed by article 85 of the Indian Limitation Act.

*Petition under section 25 of Act IX of 1887 for revision of the order of Bhai Umrao Singh, Judge, Small Cause Court. Delhi, dated the 10th August 1908.*

Dwarka Das, for petitioners.

Shadi Lal, for respondent.

The judgment of the learned Judge was as follows :—

23rd April 1910.

SCOTT-SMITH, J.—This revision has been admitted to a hearing under section 25 of the Provincial Small Cause Courts Act.

The facts are clearly given in the judgment of the Lower Court which has held that the account is not one to which Article 85 of the 2nd Schedule of the Limitation Act applies.

Article 85 reads thus—

“For the balance due on a mutual, open and current account where there have been reciprocal demands between the parties.”

The dealings between the parties began in Sambat 1942 and accounts were made up each year until Sambat 1956. Plaintiffs supplied defendant with capital by means of *hundis* and defendant supplied them with goods. According to the epitome of accounts given by the Lower Court in its judgment there was sometimes a balance against the plaintiffs and sometimes one against the defendant. In Sambats 1946, 1947, 1948 and 1954 it was against the plaintiffs and in all other years against defendant. Accounts were totalled each year and the balance due was carried forward, but there was no formal closing of the account, and no regular balance was struck until the one sued upon was struck on 11th October 1902 corresponding to Asu Sudi 9, Sambat 1959. The striking of this balance is admitted by defendant, but he says the debt was at the time barred by time.

The article is applicable to cases where the course of business is such as to give rise to reciprocal demands between the parties or such that sometimes the balance may be in



favour of one party and sometimes in favour of the other, *Narra Das Hemraj v. Vissan Das Hemraj* <sup>(1)</sup>.

The Lower Court says that if there was mutuality it ceased completely after Sambat 1954, as since that time the balance has always been in favour of the plaintiff. I am unable to agree with this. The account was still a mutual, open and current one; plaintiff went on supplying cash to defendant, and defendant, in turn, supplied goods to the plaintiff. We must look at the dealings as a whole. During the period while the account was going on there certainly were reciprocal demands between the parties, and there is no authority for the proposition that the nature of the accounts changed on the last occasion when the balance changed from being in defendant's favour to one in favour of the plaintiffs.

The Hon'ble Mr. Shadi Lal argued that the old account was closed each time that the balance was ascertained and that a new account then began, and that from and after the balance of Sambat 1955 at all events there were no reciprocal demands between the parties as defendant was always indebted to the plaintiffs. I do not think this argument has any force, because during the continuance of the dealings a balance was never formally struck. The balance was merely ascertained and carried over that the parties might know how the account stood.

The account was never closed until the balance in suit was struck.

I am, therefore, of opinion that article 85 applies.

The Lower Court states in its judgment that if article 85 does apply, then plaintiff must prove the payment of 28th October 1899 in order to bring the suit within time. The Court found this payment unproved, and with this finding I cannot interfere on the revision side.

It is, however, pointed out that defendant admitted that plaintiffs advanced him Rs. 100 on the 12th July 1899, see his counsel's statement of 21st March 1907; this was said to be the last item of the account. This item being admitted, the balance sued upon was struck within time, as it was struck within 3 years of the close of the year in which the item was entered in the account.

The suit is, therefore, within time, and as the balance is admitted and the interest charged is reasonable, I accept the

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<sup>(1)</sup> (1882) *I. L. R.*, *Bom.* 134.

revision and setting aside the Lower Court's order give plaintiffs a decree for Rs. 300 and costs throughout against the defendant.

*Revision accepted.*

### No. 76.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.  
Mr. Justice Scott-Smith.*

BALAK RAM—(PLAINTIFF)—APPELLANT,

*Versus*

DADU—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1021 of 1909.

*Specific Relief Act, I of 1877, section 41—Indian Contract Act, IX of 1872, sections 64 and 65—Sale by minor—Misrepresentation—Vendee acting in good faith—Refund of purchase-money.*

Where the facts found were that the plaintiff, when within 39 days of being *sui juris*, sold some land for Rs. 400 to the defendant who was not aware that the vendor was an infant but was deceived and acted in good faith.

*Held*, that plaintiff was bound in equity to refund the purchase-money under section 41 of the Specific Relief Act, 1877, as a condition precedent to obtaining a decree for possession of the land.

*Held*, also, that the circumstance that sections 64 and 65 of the Contract Act do not apply to the facts, does not exclude the application of section 41 of the Specific Relief Act and the rule of equity therein contained.

*Further appeal from the decree of Q. Q. Henriques, Esquire, Divisional Judge, Shahpur Division, dated the 21st July 1909.*

Nanak Chand, for appellant.

Kamal-ud-Din, for respondent.

The judgment of the Court was delivered by —

9th July 1910.

SIR ARTHUR REID, C. J.—The facts found by the Lower Appellate Court are that the plaintiff-appellant, when within 39 days of being *sui juris*, sold some land for Rs. 400 to the defendant-respondent, who was not aware that the vendor was an infant but was deceived and acted in good faith. The Lower Appellate Court consequently made refund of the purchase-money within two months, a condition precedent to the decree, for possession of the land, passed by the Court of first instance in appellant's favour.

The suit was, in our opinion, for the cancellation of the sale-deed which was the purchaser's title-deed. That deed, if left outstanding, would have imperilled the possession which the vendor sought and its cancellation was necessary to the success of the suit.

The authorities cited are—

1. *Kamta Prasad v. Shev Gopal Lal* <sup>(1)</sup> in which it was held that the mortgage entered into by an infant is not merely voidable, but void *ab initio* and that section 64 and section 65 of the Contract Act apply only to contracts between competent parties and are not applicable to a case in which there is not, and could not have been, any contract at all.

2. *Datta Ram v. Vinayak* <sup>(2)</sup> in which it was held that *Mohori Bibee v. Dharma Das Ghose* <sup>(3)</sup>, is authority for the proposition that the circumstances of a particular case may be such that, having regard to section 41 of the Specific Relief Act, the Court may, on adjudging the cancellation of an instrument, require the party to whom such relief is granted to make to the other any compensation which justice may require.

3. *Mohori Bibee v. Dharma Das Ghose* <sup>(3)</sup>, above cited, in which it was held that sections 64 and 65 of the Contract Act being based on the existence of a contract between competent parties, is inapplicable to a case where there is not, and could not have been, any contract at all, one party being a minor; and it was further held that section 41 of the Specific Relief Act gave the Court discretion to make compensation by the successful party a condition of the decree. In the case before their Lordships the party who lent money to a minor was aware of the minority and their Lordships saw no reason for interference with the Courts below, which exercised their discretion and declined to order compensation.

4. *Jagan Nath Singh v. Lalti Parsad* <sup>(4)</sup> in which it was held that whether the doctrine of estoppel does or does not apply to a contract entered into by a minor, where persons, who are in fact under age, by false and fraudulent misrepresentation as to their age, induce others to purchase property from them, they are liable in equity to make restitu-

<sup>(1)</sup> (1904) I. L. R. 26 All 342

<sup>(2)</sup> (1904) I. L. R. 28 Bom. 181.

<sup>(3)</sup> (1903) I. L. R. 30 Cal. 539 P. C.

<sup>(4)</sup> (1909) I. L. R. 31 All. 21.



tion to the purchasers for the benefit they have obtained, before they can recover possession of the property sold.

On these authorities we have no hesitation in maintaining the decree of the Lower Appellate Court. The fact that Sections 64 and 65 of the Contract Act do not apply to the facts before us does not exclude the application of section 41 of the Specific Relief Act and the rule of equity therein contained. The appeal fails and is dismissed with costs.

*Appeal rejected.*

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**No. 77.**

*Before Hon. Mr. Justice Scott-Smith.*

MR. MAIDEN—(DEFENDANT)—PETITIONER

*Versus*

BHONDU—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 1582 of 1909.

*Civil Procedure Code, Act V of 1908, Order VIII, rule 6—Set-off—Kinds of—*

*Held* that the law recognises two kinds of set-off (1) statutory and (2) equitable. The statutory provisions contained in Civil Procedure Code, Act V of 1908, Order VIII, rule 6, are not exhaustive. Where a washerman declines or is unable to return articles made over to him to wash, his employee is equitably entitled to set-off the value when paying him his wages.

*Petition under section 25 of Act IX of 1897, for revision of the order of Khwaja Tasadduq Husain, Judge, Small Cause Court, Delhi, dated the 3rd May 1909.*

Chuni Lal, for petitioner.

Bhundu, respondent, in person.

The judgment of the learned Judge was as follows :—

21st June 1910.

SCOTT-SMITH, J.—I do not consider that the Judge, Small Cause Court, was right in refusing to allow defendant to set off the value of sheets short returned by the plaintiff. Its reasons were that the price was not ascertained and the loss was denied by the plaintiff.

So far as the latter point is concerned it depends upon evidence.

With reference to the former I have to remark that there are two kinds of set-off (1) statutory, and (2) equitable. Statutory set-off can be claimed as of right under Order VIII, rule 6, Civil Procedure Code. I do not think the defendant

could claim a set-off as of right, but this provision of the law is not exhaustive and does not take away any rights of equitable set-off which parties would have independent of it. Such set-off should be allowed only where the Court deems it equitable to allow it. Surely if a washerman loses some of the articles given to him to wash his employer is entitled equitably to set off the price of those articles when paying him his wages.

I hold that in the present case the defendant was equitably entitled to a set-off.

I therefore allow the revision, set aside the decree of the Small Cause Court, and remand the case for re-decision after inquiry into defendant's claim to a set-off. Costs in this Court to be costs in the case. Pleader's fee *ad valorem*.

*Revision accepted.*

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**No. 78.**

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and  
Hon. Mr. Justice Johnstone.*

**NUR-UL-HASAN—(PLAINTIFF)—APPELLANT**

*Versus*

**MUHAMMAD HASAN AND OTHERS—(DEFENDANTS)—  
RESPONDENTS.**

**Civil Appeal No. 1068 of 1908.**

*Muhammadan Law—Acknowledgment—Child born more than 280 days after the dissolution of his mother's marriage but less than six months after second marriage, legitimacy of—Indian Evidence Act, I of 1872, section 112.*

One Mussammat R. was divorced by her first husband on the 1st October 1895. She married G. N. on the 4th February 1896 and bore a child on the 17th July 1896, the child was thus born more than 280 days after the dissolution of his mother's marriage with her first husband but less than six months after her marriage with G. N. The plaintiff contended that under Muhammadan Law no acknowledgment of paternity by G. N. could legitimise the child, and it was found that the *iddat* of repudiation had terminated before the marriage with G. N. although the child must have been procreated before the termination of that *iddat* G. N. acknowledged the child and treated it as his own.

*Held*, that the marriage of Mussammat R. with G. N. though irregular was not void, that when the child was born a marriage between his mother and G. N. subsisted; that section 112 of the Indian Evidence Act, 1872, was applicable to the case and the child was entitled to inherit to G. N. as his legitimate son.

*Further appeal from the decree of M. L. Waring, Esquire, Additional Divisional Judge, Amritsar Division, dated the 6th June 1908.*

Fazal Hussain, for appellant.

Duni Chand, for respondent.

The judgment of the Court was delivered by—

7th July 1910.

SIR ARTHUR REID, C. J.—The question for decision is whether Muhammad Hasan is the legitimate son of Ghulam Nabi.

The facts found by the Lower Appellate Court are that Mussammat Rajo was divorced by her first husband on the 1st October 1895, that she married Ghulam Nabi on the 4th February 1896, and that she bore Muhammad Hasan on the 17th July 1896. In these findings of fact we concur. Muhammad Hasan was thus born more than 280 days after the dissolution of his mother's marriage with her first husband and there is no presumption under section 112 of the Evidence Act that he is the son of her first husband. He was also born less than six months after his mother's marriage to Ghulam Nabi and the contention of the appellant was that under the Muhammadan Law no acknowledgment of paternity by Ghulam Nabi could legitimise him. The following authorities which have been cited are in point :—

(1) Ameer Ali's; Muhammadan Law, Edition 3, Vol. II, pages 224—25.

“ If a man marry a woman, and she be delivered of a child within six months from the day of marriage, the paternity of the child from him is not established, because conception must have taken place before the marriage ; but if she is delivered at six months or more, its paternity is established because of the subsisting bed, and the completion of the term of pregnancy, whether he acknowledged the child or remained silent ; and if he should deny its birth, that may be established by the testimony of one woman bearing witness to the fact. It is the right of a man to legitimate a child born within the time by acknowledging expressly or impliedly that the conception took place in wedlock.”

Page 235 of the same :—

“ An invalid marriage is one where the parties do not labour under an inherent incapacity or absolute bar or where the disability is such as can be removed at any time. The issue of such unions are legitimate.”



Pages 322 and 323 of the same :—

“According to all sects, it is unlawful to contract a marriage with a woman who is *enciente*, or if it be known that the pregnancy is from her husband or master. But according to the *Hanafis*, it is lawful for a man to contract a marriage with a woman who is pregnant by fornication with some body else, though connubial intercourse is forbidden until she is delivered. When a woman is pregnant by fornication with the same man who marries her, the marriage is lawful, and connubial intercourse is not forbidden between them. On this there is consensus.”

(2) Mulla's Muhammadan Law, Edition 2.

Article 182—

“A marriage with a widow or a divorced woman before the expiration of the period of *iddat*, which it is incumbent upon her to observe on the death of her husband or on divorce, is void. The *iddat* of a woman arising on divorce is three periods or three months from the date of divorce.”

Article 224—

“The wife cannot marry another husband until after completion of her *iddat*.”

(3) Shama Charan's Muhammadan Law, Edition I, Vol. I, Article CCLX,—

“The *iddat* of a pregnant woman is accomplished by her delivery whether she be slave or free.”

Article CCCCLXVIII.—

“If a man have erroneously carnal connection with a woman who is in her *iddat* from divorce, another *iddat* becomes incumbent upon her and the two are blended together, i. e., the periods are counted from both *iddats*, and if the former *iddat* should be accomplished before the latter, the accomplishment of that still remains incumbent upon her.”

(4) Abdurrahman's Muhammadan Law :—

Article 1—

“A proposal of marriage may be made to any woman who is free from the marriage tie and from *iddat*.”

Article 2—

“It is not lawful to openly propose marriage to a woman while she is observing *iddat*, consequent upon her repudiation.”

## Article 132—

“Where a man contracts marriage with a woman who is observing *iddat* consequent upon repudiation, such marriage is void.”

## Article 316—

“The period of *iddat* of a pregnant woman ends with her delivery, provided the child when born is partly formed. This is the case whether the retirement was consequent upon the husband's death or upon repudiation.”

(5) *Ashrufood Doulat Ahmed Hossain Khan v. Hyder Hossein Khan* (1),

“The presumption of legitimacy from marriage follows the bed, and whilst the marriage lasts, the child of the woman is taken to be the husband's child; but this presumption follows the bed and is not antedated by relation. An ante-nuptial child is illegitimate. A child born out of wedlock is illegitimate if acknowledged he acquires the status of legitimacy. When, therefore, a child really illegitimate by birth becomes legitimated, it is by force of an acknowledgment express or implied directly proved or presumed. The child of marriage is legitimate as soon as born. The child of a concubine may become legitimate by treatment as legitimate. Such treatment would furnish evidence of acknowledgment.”

(6) *Muhammad Allahdad Khan v. Muhammad Ismail Khan* (2), page 339, where Mahmood, J., said that the peculiarity of the English law is not concerning itself with the conception but considering a child legitimate who is born of parents married before the time of his birth, though they were unmarried when he was begotten had no doubt been imported into India by section 112 of the Indian Evidence Act, and it might some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Muhammadan Law of marriage, parentage, legitimacy and inheritance, which departments of law under other statutory provisions are to be adopted as the rule of decision by the Courts in British India.

(7) *Murdansahib v. Rajahsahib* (3), in which it was held that under the Muhammadan Law a person can acknowledge

(1) (1886), XI. M. I. A. 94. (2) (1888) I. L. R 10 All. 289.

(3) (1910) I. L. R. 34 Bom. 111.

a child as a son, when there is no proof of the latter's legitimate or illegitimate birth and his paternity is unknown, in the sense that no specific person is shown to have been his father, but that it is not permissible to acknowledge a child born of fornication, adultery or incest.

At page 5 of Cunningham's Indian Evidence Act, Edition II, it is said that it may be a question whether the doctrine of Muhammadan Law, which determines legitimacy by reference to the date of conception and not the date of birth, must give way to the principle involved in section 112 of the Evidence Act. This remark is apparently based on the Allahabad case, and a similar remark based on the same appears at page 593 of Ameer Ali and Woodroffe's Evidence Act, Edition 4, and at page 231 of Cunningham's Work it is stated that the presumption under the Muhammadan Law against the legitimacy of a child born less than six months after the mother's marriage might, in so far as it fixes the period of six months, be considered a rule of evidence and as such repealed by section 112 of the Evidence Act, but that the principle requiring that the child should be procreated after the date of marriage is apparently a rule of substantive law and is not affected by the section being no more a mere rule of evidence, or procedure than is the English doctrine which allows legitimacy to all children born to the woman after marriage.

In *Umr v. Muhammad Hayat* <sup>(1)</sup> a Division Bench of this Court held in a case between Muhammadans, after considering the effect and applicability of section 112 of the Evidence Act, that on the birth of a child during marriage the presumption of legitimacy is conclusive, no matter how soon after the marriage the birth occurs.

In *Kurshaid Jan v. Abdul Hamid Khan* <sup>(2)</sup> a Division Bench held that, according to Muhammadan Law, marriage with a fifth wife in presence of four living wives is invalid but not void, and that the children of such marriage are legitimate and entitled to inherit their father.

In *Ilahi v. Imam Din*, <sup>(3)</sup> a Single Bench held that a marriage contracted by a Muhammadan widow before the expiry of her *iddat* is unlawful and void, and that the mere fact that, prior to the expiry of the *iddat* she had been delivered of a child cannot validate a marriage illegally effected before expiry of the *iddat*.

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<sup>(1)</sup> 79 P. R., 1907.

<sup>(2)</sup> 6 P. R., 1908.

<sup>(3)</sup> 29 P. R., 1909.



In the case before us the *iddat* of repudiation had terminated before the marriage with Ghulam Nabi, although Muhammad Hasan must have been procreated before the termination of that *iddat*.

We are inclined to believe that the procreation was by Ghulam Nabi, and we see no reason to doubt that he acknowledged Muhammad Hasan to be his son and treated him as such.

The authorities on the question of the validity of the marriage are conflicting, but the second and third extracts from Ameer Ali's work and the decisions of their Lordships of the Privy Council and of the Bombay Court above cited with the P. R. 1908 case incline us to the conclusion that the marriage, though possibly irregular, was not void and that when Muhammad Hasan was born, a marriage between his mother and Ghulam Nabi subsisted. Although we are in some doubt on the point, we are not satisfied that the decisions of the Lower Appellate Court and the Court of first instance were erroneous. We are, in fact, inclined to the conclusion that those decisions were correct.

We see no reason for differing from the decision of the Division Bench of this Court that section 112 is applicable to the case, and, as already stated, Muhammad Hasan was born while a marriage between his mother and Ghulam Nabi subsisted. He is, therefore, entitled to inherit to the latter.

The appeal fails and is dismissed, but having regard to the novelty of the points raised and the conflict of authority, we leave parties to bear their own costs of this Court.

*Appeal reiected.*

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No. 79.

*Before Hon. Mr. Justice Ryves and Hon. Mr. Justice*

*Scott-Smith.*

MUSAMMAT AS KAUR—(PLAINTIFF)—APPELLANT,

*Versus*

SAWAN SINGH AND OTHERS—(DEFENDANTS)—

RESPONDENTS.

Civil Appeal No. 224 of 1909.

*Custom marriage—Validity of Karcua marriage between a Jat and Koli woman—Succession.*

*Held*, that among Jats a *karewa* marriage of a Jat with a Kori woman is valid by custom, and such widow is entitled to succeed to the property of her late husband for her life.

*Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated the 10th December 1908.*

Sheo Narain, for appellant.

Sander Das, for respondents.

The judgment of the Court was delivered by--

SCOTT-SMITH, J.—The facts of this case are given sufficiently in the judgment of the First Court. 20th June 1910.

The only question at issue is whether Mussammat As Kaur was the lawful wife of Natha Singh. If she was, then she is entitled to possession of his property as his widow.

The First Court found that she had been married to Natha Singh by *karewa* ceremony and decreed her claim.

The learned Divisional Judge held that the evidence about performance of any ceremony was unreliable, and that there was no evidence that plaintiff had been treated by Natha Singh as his wife. He also stated that plaintiff was a Kori (a sweeper or Chamar apparently) and could not lawfully marry a Jat. He accordingly accepted the appeal and dismissed the plaintiff's claim. She has filed a further appeal to this Court.

There are a good many witnesses to the alleged *chadar andazi*, including Bhagwan Singh, *lambardar*. The First Court, which heard them giving evidence, was the best judge of their reliability. They do not all appear to be interested, and we cannot see any good reason for rejecting their evidence which the First Court accepted.

The agreements executed by Prabhu Dial who brought the plaintiff from Karachi and by plaintiff herself show that she was being made over to Natha Singh for the purpose of being married to him by *chadar andazi*. Jats do procure women in this way and it is *prima facie* more likely that the customary marriage by *karewa* took place between Natha Singh and Mussammat As Kaur than that the latter lived as concubine of the former.

We do not think much reliance should be placed on the evidence of Chajju, Brahman, who naturally supports the Jats against a helpless woman. We hold that Natha Singh married Mussammat As Kaur by *karewa*.

As to Mussammat As Kaur being a Chamar, whom Natha Singh could not legally marry according to the custom of the

Jats, we find that no such plea was raised in the First Court and no issue was drawn.

Defendants pleaded that she was of a low caste, but not of a caste with a member of which a Jat could not marry.

We are not, as at present advised, at all convinced that a marriage between a Jat and a Kori or Koli woman would be illegal.

In Ibbetson's Settlement Report, Vol. I, page 659, Koris are said to be a tribe of Chamars whose headquarters are in Oudh; it is stated, however, that they rarely work in leather but are employed as grass-cutters, weavers, grooms, etc.

In the *Census of India*, 1901, ethnographic appendices by Risley, at page 168, the Kolis are shown as a sub-division of Chamars who are Hindu weavers, grooms, and field labourers.

In Bhattacharya's *Hindu Castes and sects* the Koris, at page 274, are described as a clean Sudra caste from whose hands Brahmans will take drinking water.

What we gather from these authorities is that the Kolis are not Chamars by profession, though they may be a sub-division of that tribe. The Jats are not members of the twice-born castes themselves, and are by no means particular as to the woman with whom they contract *karewa* unions, they are Sudras, and we do not see any reason for holding that the marriage of a Jat with a Koli would be invalid by custom, and we are strengthened in our view by the noteworthy fact that defendants never raised any plea as to the legality of plaintiff's marriage, if any took place with Natha Singh.

We, therefore, accept the appeal and setting aside the order of the Lower Appellate Court restore that of the First Court with costs throughout in favour of the plaintiff against defendants.

*Appeal allowed.*

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### No. 80.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.  
Mr. Justice Scott-Smith.*

HANWANTA—(PLAINTIFF)—APPELLANT,

*Versus*

AKBAR KHAN AND OTHERS—(DEFENDANTS)—  
RESPONDENTS.

Civil Appeal No. 324 of 1909.

*Bahi account—Proof and corroboration of section 34, Indian Evidence Act, I of 1872.*



Where certain disputed items were interspersed in an otherwise true account in a village *bahi* which had as a whole, been tendered in evidence and sworn to as correct by the plaintiff and was found by the Commissioner to be correct and regular according to village custom in that part of the country to which the parties belonged, the First Court having decreed the suit in part, the Divisional Judge on appeal dismissed it *in toto* on the ground that the *bahi* was unreliable.

*Held*, by the Chief Court that there was sufficient proof in support of the claim.

*Further appeal from the decree of Q. Q. Henriques Esquire, Additional Divisional Judge, Ferozepore Division, dated the 26th November 1908.*

Lal Chand and Lachmi Narain, for appellant.

Duni Chand and Cooper, for respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—This was a suit for Rs. 2,400 due on 9th July 1910. a book account. The facts are fully stated in the judgment of the First Court. Dealings were not denied: in fact defendants, at one time or another, admitted a great many of the items of account. Certain items amounting to Rs. 236 were disallowed by the First Court as having been neither admitted nor proved. There was also a dispute about the amount of grain paid and in particular in regard to items Nos. 2 and 3, which are as follows:—

265 maunds 13 seers wheat paid on Har 9th, Sambat 1961.

266 maunds wheat paid on Jeth Sudi 10th, Sambat 1961.

These dates correspond respectively with 22nd and 23rd June 1904 and are not identical as thought by the learned Divisional Judge. Plaintiff explained that these two items of payment were really one and the same, (see ground 4 of his appeal in the Lower Appellate Court), but both the Courts below have concurred in disbelieving him.

The First Court deducted the value of this 266 maunds of wheat, and adding Rs. 400 on account of interest at 2 per cent. per mensem decreed Rs. 992.

Both parties appealed to the Divisional Judge. That officer held that the plaintiff's account book was unreliable and on this ground alone accepted defendants' appeal and dismissed the suit *in toto*.

Plaintiff has filed a further appeal to this Court. After hearing arguments and going carefully through the record we find ourselves in general agreement with the First Court.

We have checked the items of debt and find that they amount to Rs. 1,390-4-0 as stated by the First Court in its judgment and not to Rs. 1,433-9-0 as shown in the plaint.

The following items were disallowed by the First Court :—

					Rs.	a.	p.
No.	25	...	...	...	25	0	0
,	26	...	...	...	24	0	0
,	27	...	...	...	45	0	0
,	36	...	...	...	62	12	0
,	38	...	...	...	47	4	0
,	41	...	...	...	34	0	0

The appellant's advocate gives up the first three of these items, accepting the First Court's reasons for disallowing them, so we need not refer to them further.

The other three items were disallowed, because they were not admitted by defendants and no specific evidence was adduced in regard to them.

It cannot, however, be said that there is no evidence in regard to them; there are the entries in plaintiff's account book which, according to the report of the Commissioner, is correct and regular according to village custom in the part of the country to which parties belong. There is also plaintiff's own statement on solemn affirmation that the account is correct.

We see no reason why three fictitious items should have been interspersed in an otherwise true account, and we think those in question must be held to have been sufficiently proved.

As regards the two items of payment of 265 maunds, 13 seers and 266 maunds of wheat referred to above, we have the concurrent finding of the Lower Courts, and this is in accordance with the entries in plaintiff's own *bahi*. It is easy for him to say that there was only one payment, the second entry having been made after weighment. If these entries had referred to only one payment, we think the fact would have been made clear by some explanatory note entered in the account book. The word *tajale*, which appears just before the second item, is very suspicious.

We accept the plaintiff's *bahi* as substantially correct, and this being so, we cannot go against the plain meaning of entries which are favourable to the defendants.

We do not consider that the learned Divisional Judge disposed of the case in a satisfactory manner. He should, at

least, have endeavoured to ascertain, taking all the evidence and defendants' admissions into consideration, what really was due.

Rupees 597-4-0 was the principal found due by the First Court which added Rs. 400 as interest for three years at 2 per cent. per mensem, but calculation shews that Rs. 430 is the correct interest.

The following sums should, therefore, be added to that decreed by the First Court :—

		Rs.	a.	p.
On account of mistake in interest	...	30	0	0
———— 3 items disallowed	...	142	0	0
———— interest on same	...	106	8	0
		<hr/>		
Total	...	278	8	0

We accept the appeal, and, reversing the order of the Lower Appellate Court give plaintiff a decree for Rs. 1,270-8-0 and costs in proportion against the defendants in the First Court and in this Court.

In the Lower Appellate Court the parties will bear their own costs.

*Appeal allowed.*

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### No. 81.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

MIR HAZAR KHAN AND OTHERS—(DEFENDANTS)—

APPELLANTS,

*Versus*

SAWAN ALI—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1008 of 1909.

*Damages for breach of contract—Measure of—Indian Contract Act, IX of 1872, section 72.*

*Held*, that in cases in which *ex-necessitate rei*, it is impossible to fix the exact amount of damages actually resulting from a breach of contract. Courts of equity do not interfere with the contract of the parties who, in anticipation of the breach, have stipulated that a fixed sum should be regarded as the measure of compensation to be paid by the person violating the contract. In such cases the Courts will not exercise the power conferred by section 74 of the Indian Contract Act of reducing the contract damages.



*Further appeal from the decree of Major B. O. Roe, Divisional Judge, Multan Division, dated the 18th May 1909.*

Beechy, for appellants.

Govind Das, for respondent.

The judgment of the learned Judge was as follows :—

22nd April 1910.

SIR ARTHUR REID, C. J.—The pleas argued were—

(1) that the compensation decreed for damage done, and the damages decreed for failure to give plaintiff-respondent possession, were excessive ;

(2) that it had been proved by the evidence of Lala Rang Ram, Revenue Officer, that appellants were allowed two months from the 18th August 1905 for the purpose of housing themselves on the other side of the canal, and that the respondent prevented their housing themselves within the fixed period, by inducing a Criminal Court to restrain them from building near his land ;

(3) that Muhib Khan, *girdawar kanungo*, and Gurbakhsh Rai, *patwari*, proved that on the 2nd December 1905 possession of the *zanana* premises had been delivered to the respondent and that the appellants said that the respondent could break the lock of the door of the rest of the house and take possession as they had nothing to do with it ;

(4) that Rang Ram deposed that the parties expressly agreed that they would refer to arbitration or oath any dispute, before going into Court.

These pleas have, in my opinion, no force.

The suit was filed about ten days after the respondent obtained possession, and the Lower Appellate Court was, in my opinion, justified in accepting the estimate of the District Judge, who inspected the premises of the damage done.

The parties fixed Rs. 10 *per diem* as damages payable by the appellants to the respondent for failure to deliver possession.

I concur with the Courts below in holding that the respondent was kept out of possession for 46 days and was in no way responsible for being kept out. The premises other than the *zanana* were in the possession of the appellants, or of their tenant, and the respondent could not take possession forcibly. In *Nait Ram v. Shib Dat* (1) it was held that in

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(1) (1882) *I. L. R.*, 5 *All.*, 238.

cases in which, *ex-necessitate rei*, it is impossible to fix the exact amount of damages actually resulting from a breach of contract. Courts of equity do not interfere with the contract of the parties who, in anticipation of the breach, have stipulated that a fixed sum should be regarded as the measure of compensation to be paid by the person violating the contract. The judgment of Lord Fitzgerald in *Lord Elphinstone v. Monkland Iron and Coal Co.*, (1) at pages 346-7, is also in point. In such cases the Courts will not exercise the power, conferred by section 74 of the Contract Act, of reducing the contract damages. The present is eminently a case for the application of this rule. It is impossible to fix the actual damages consequent on the appellant's failure, and the cross-objection on this point must be allowed by increasing the sum decreed as damages for failure to deliver possession from Rs. 230 to Rs. 460, being Rs. 10 *per diem* for 46 days.

I am not satisfied that the parties agreed to submit all disputes to arbitration or oath.

This condition does not appear on the mutilated contract deed, and Rang Ram, who deposed to it, may have been thinking of the agreement to submit the value of the house to the oath of the appellant Mir Hazir. I am not satisfied that the respondent was in any way responsible for the mutilation of the contract deed, or that the appellants ever called on the respondent to submit the matters in dispute to arbitration or oath.

The grounds taken in appeal and the cross-objections, except as to the damages for failure to deliver possession, have no force.

The appeal is dismissed with costs and the sum decreed as damages is increased by Rs. 230 (two hundred and thirty).

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**No. 82.**

*Before Hon. Mr. Justice Chevis.*

**SARDARNI BHAGWAN KAUR—(PLAINTIFF)—  
PETITIONER,**

*Versus*

**RANI HARNAM KAUR—(DEFENDANT)—RESPONDENT.**

Civil Miscellaneous No. 162 of 1910.

*Civil Procedure Code, Act V of 1908, section 151, Order 21, rule 29 and Order 41, rule 5, Stay of execution.*

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(1) *L. R. XI, A. C. H. of L. 346.*

H. K. obtained a decree against B. K. in 1907, execution of which was stayed on appeal pending the decision of a counter-case brought by B. K. against H. K. B. K.'s suit having been dismissed and an appeal preferred to the Chief Court, B. K. asked for stay of execution of H. K.'s decree of 1907, pending hearing of the appeal in her (B. K.'s.) case. It was contended on the authority of *Guest v. McGregor* <sup>(1)</sup> that the Court had no power to accede to this prayer. *See*

*Held*, that since the passing of the new Civil Procedure Code the dictum contained in *Guest v. McGregor* <sup>(1)</sup> was no longer applicable, and that the order sought for could be made under section 151 of that Code.

*Held*, also, that an Appellate Court has, generally speaking, as full powers as the Original Court and can do while the appeal is pending what the Original Court could have done while the suit was pending.

*Application under Order XLI, rule 5, of the Civil Procedure Code, 1908, for stay of execution proceedings pending the decision of the appeal.*

Muhammad Shafi, for petitioner.

Shadi Lal, for respondent.

The order of the learned Judge was as follows :—

15th July 1910.

CHEVIS, J.—The petitioner, Rani Bhagwan Kaur, seeks for stay of execution of the decree of 4th July 1907. By order of this Court now published as *Bhagwan Kaur v. Gajinder Singh* <sup>(2)</sup> execution was stayed pending decision of the suit brought by the judgment-debtor, Rani Bhagwan Kaur, against the decree-holder. That suit has now been decided, Rani Bhagwan Kaur's suit being dismissed with costs. An appeal from this order of dismissal has been presented to this Court and admitted. Rani Bhagwan Kaur now prays that execution of the decree of 4th July 1907 may be stayed pending decision of the appeal.

Mr. Shadi Lal, for respondent, relying on *Guest v. McGregor* <sup>(1)</sup> urges that execution cannot be stayed by this Court, as it cannot be said that any suit is now pending in any Court against the holder of a decree of such Court. It certainly seems to me that Order 21, rule 29, does not meet the petitioner's case, as the suit has now reached the appellate stage and is pending in this Court, whereas the decree of 4th July 1907 is not a decree of this Court. With the reasoning adopted in *Guest v. McGregor*, <sup>(1)</sup> I have no desire to find fault, but since *Guest v. McGregor* <sup>(1)</sup> was pronounced, the new Civil Procedure Code of 1908 has come into force, and section 151 of the new

<sup>(1)</sup> 41 P. R., 1904.

<sup>(2)</sup> 130 P. R., 1908.



Code has now to be considered. That section lays down that nothing in the Code shall be deemed to limit the inherent powers of the Court to make such orders as may be necessary for the ends of justice. This seems to me to emphasize the view which has been expressed in certain former judgments—*Hukam Chand Boid v. Kamalanand Singh* <sup>(1)</sup> see remarks on pages 930-932 as to the Code not being exhaustive. It does not follow that an order cannot be passed simply because there is no express section in the Code providing for the passing of such an order. But Mr. Shadi Lal urges that where a particular matter, such as stay of execution of a decree pending decision of further litigation between the judgment-debtor and decree-holder has been provided for, those provisions must be taken to be exhaustive and cannot be extended. I do not think this necessarily follows. If a section of the Code were to provide a certain time within which an act might be done, I think the necessary implication would be that the act might not be done beyond that time. But I do not think that Order 21, rule 29, prohibits anything by implication. An Appellate Court has, generally speaking, as full powers as the Original Court, and I take it that in the absence of any express provision to the contrary, the Appellate Court can do now, while the appeal is pending, what the Original Court could do while the suit was pending before it. I do not think it can be said that the dismissal of the suit in the First Court warrants any presumption that the appeal will be unsuccessful. I hold that though the case is not provided for by Order 21, rule 29 (equivalent to section 243 of the old Civil Procedure Code), section 151 meets the case, and that I have power to stay execution pending the appeal.

As to whether this is a case in which execution should be stayed, I need only refer to the reasons for stay of execution given in *Bhagwan Kaur v. Gajindar Singh* <sup>(2)</sup>. Those reasons still seem to me to have force. Without prejudicing the appeal in any way I can safely say that the suit has not yet been threshed out on its merits.

But counsel for petitioner is quite content that execution shall not be stayed except as regards residence. I, therefore so far modify my *interim* order staying execution as to reduce

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<sup>(1)</sup> (1906) *I. L. R.* 33, *Cal.* 927.

<sup>(2)</sup> 130 *P. R.*, 1908.

it to one staying execution only so [far as possession of the house, in which the petitioner at present resides, is concerned.

No order as to costs on this application.

### No. 83.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

ABDUL HAQ—(DEFENDANT)—APPELLANT,

*Versus*

NIAZ AHMAD—(PLAINTIFF)

AND

R. SKINNER *alias* SARDAR MIRZA } RESPONDENTS.  
AND OTHERS—(DEFENDANTS) }

Civil Appeal No. 1207 of 1908.

*Jurisdiction—Court cannot decide other question till point of jurisdiction settled.*

Where in a suit before a Munsif, 1st class it was objected that the suit was undervalued and that the value for jurisdictional purposes was Rs. 2,000, but the Munsif, without deciding the question of jurisdiction dismissed the suit as barred by limitation.

*Held*, by the Chief Court that, the first question for decision is the Jurisdiction of the Court in which the suit is filed. If the Court has not jurisdiction the proceedings are *coram non judice*, and no question, either of fact or law, can be decided except that of jurisdiction.

*Miscellaneous appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 14th October 1908.*

Chuni Lal, for appellant.

Abdul Kadir, for respondents.

The judgment of the learned Judge was as follows :—

19th April 1910.

SIR ARTHUR REID, C. J.—The first plea taken in the Lower Appellate Court by the appellants there (respondents here) was that the Court of first instance should have first decided the question of jurisdiction raised by the defendant's plea that the property in dispute was worth Rs. 2,000, and that the suit was consequently not within the jurisdiction of a Munsif, and the first plea taken here is that that plea should have been disposed of by the Lower Appellate Court before considering the question of limitation.

The plea must be allowed. The first question for decision is the jurisdiction of the Court in which the suit is filed. A Court cannot say that the suit is barred by limitation and consequently cannot proceed in any Court.

If the Court has not jurisdiction, the proceedings are *coram non judice*, and no question, either of fact or law, can be decided except that of jurisdiction. The competence of the Court must be established before any plea affecting not jurisdiction but the suit itself can be entertained.

I allow the appeal, set aside the order of the Lower Appellate Court, and remand the appeal under Order XLI, rule 23, for decision in advertence to the above remarks.

The Court-fee on the memorandum of appeal will be refunded and other costs here will be costs in the cause.

Counsel's fee twenty-five rupees.

*Appeal allowed.*

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**No. 84.**

*Before Hon. Mr. Justice Chevis.*

ALLAH DITTA AND OTHERS—(DEFENDANTS)—

APPELLANTS,

*Versus*

MUHAMMAD NAZIR AND OTHERS—

(PLAINTIFFS)

AND

GOBIND RAM—(DEFENDANT)

} RESPONDENTS.

Civil Appeal No. 22 of 1910.

*Pre-emption—New sub-division in an old town—Garhi Awan, Hafizabad, District Gujranwala.*

*Held*, that the custom of pre-emption does not prevail in the *abadi jadid* of the old village of Garhi Awan a suburb of Hafizabad.

*Held*, also, that the *abadi jadid*, which was situate just outside the old borders of the town, must be looked upon as a sub-division within the meaning of the Punjab Pre-emption Act, II of 1905, notwithstanding that it had not yet received a name as a *mohalla*, and that no sub divisions weret recognized in the old town.

*Further appeal from the decree of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Sialkot Division, dated the 27th April 1909.*

Bhagwan Das, for appellants.

Sukh Dial, for respondents.

The judgment of the learned Judge was as follows :—

CHEVIS, J.—This is a case of pre-emption. The site sold 29th March 1910. is a part of what was formerly the village of Garhi Awan, but is now a suburb of Hafizabad. The Lower Courts have



decreed the claim, holding that this new *abadi* is a part of the town of Hafizabad, that there are no sub-divisions in that town, and that the custom of pre-emption obtains in the town. For respondents it is urged that the findings that the new *abadi* is a part of the town, and that there are no sub-divisions in the town are findings on questions of fact and cannot be attacked. But I have to decide whether the custom of pre-emption prevails as far as this site is concerned, and the questions of fact and custom appear to me to be inextricably mingled in a case like the present.

The site is described in the plaint as "situated in *maura Garhi Awan abadi jadid*." It is true, no doubt, that this *abadi jadid* extends right up to (or perhaps I should rather say, directly from) the old borders of the town and is now a part of the town, also that no name has as yet been given to this new part except that of *abadi jadid*. But I cannot see that it follows even in the case of an old town in which no sub-divisions have hitherto been recognized, that a totally new suburb should be regarded as other than a sub-division, simply because no one has yet christened it as a *mohalla*. I regard this new *abadi* as a distinct part of the town so far as pre-emption goes. It is not a case of house after house being erected on the edge of a town merely to meet the press of population, the limits of the town thus being gradually extended; it is a case of a totally new block of buildings, mostly, if not all shops, a new *mandi* in fact. As to cases of pre-emption in this new *abadi* there is the case in which Barkat Ram sued Mussammatt Husain Bibi in 1904; in this case there was a compromise, Barkat Ram giving up part of his claim and purchasing the rest. This proves nothing in my opinion. There is also the case of Shahbaz Khan, which apparently relates also to what is now the new *abadi*, but the site then in suit seems to have been merely agricultural land at time of suit and regarded as part of Garhi Awan village. None of the other cases cited seem to refer to the new *abadi* at all. I hold the custom of pre-emption in the new *abadi* not proved and, I accept the appeal and dismiss the suit with costs throughout.

*Appeal allowed.*

## No 85.

*Before Hon. Mr. Justice Ryves.*

MUSSAMMAT BEGAM JAN AND ANOTHER,—(DEFENDANTS),  
—APPELLANTS,

*Versus*

QADAR KHAN AND ANOTHER—(PLAINTIFFS)—RESPOND-  
ENTS.

Civil Revision No. 344 of 1910.

*Custom Alienation—Creation of mukarridari rights by widow—Permanent alienation.*

Mussammat B. J., Patban of Parnali in the Attock District, Rawalpindi Division, created *mukarridari* rights in a portion of her joint holding in favour of her son-in-law M. A., and received Rs. 300 *nazrana* from him, and mutation was sanctioned in favour of M. A. On 26th June 1908-B. J's husband's brothers (plaintiffs) sued for a declaration that this alienation should not affect their reversionary rights on the death or re-marriage of the widow. The First Court holding the *mukarridar* to be a tenant and the alienation for necessity, dismissed the suit. The Divisional Judge on appeal held that the creation of *mukarridari* rights amounts to a permanent alienation, and passed a decree in favour of plaintiffs fixing Rs. 124 for valid necessity. On revision the Chief Court,

*Held following Maya Das v. Malik Aulia Khan* <sup>(1)</sup> that the creation of *mukarridari* rights amounts to a permanent alienation.

*Petition under section 70 (b) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 5th May 1909.*

Douglas, for petitioners.

Morrison, for respondents.

The judgment of the learned Judge was as follows :—

RYVES, J.—The facts of the case are given in the judgments of the Lower Courts. The parties come from the Rawalpindi Division.

20th July 1910.

The chief question for decision in this case is whether the creation of *mukarridari* rights is equivalent to a permanent alienation. Both the Courts below have concurred in holding that it is.

The status of a *mukarridar* in the Rawalpindi Division is described in *Maya Das v. Malik Aulia Khan* <sup>(1)</sup>. A *mukarridar* can alienate without consulting his landlord, and the right is not

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<sup>(1)</sup> 10 P. R. 1896, Rev.

extinguished at his death, but can be inherited by a collateral irrespective of whether the common ancestor occupied the land. This being so, it seems to me that for all intents and purposes the creation of a *mukarridari* right amounts to a permanent alienation. As shown in *Maya Das v. Malik Aulia Khan* <sup>(1)</sup>, the grant of occupancy rights have in some cases been held to amount to permanent alienations.

The only other ground for revision challenges a finding of fact arrived at by the learned Divisional Judge, with which I do not think it is necessary to interfere.

The result is that the application fails, and is dismissed with costs.

*Revision rejected.*

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No. 86.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and  
Hon. Mr. Justice Scott-Smith.*

HARNAM SINGH, &C.,—(PLAINTIFFS),—APPELLANTS,  
*Versus*

SAJAWAL &C.—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 778 of 1910.

*Mortgage by conditional Sale—Gift of equity of redemption prior to the expiry of mortgage term—validity of such gift under Muhammadan Law—notice of foreclosure to original mortgagor—necessity of notice to donee.*

The plaintiffs instituted the present suit against the defendant for possession of certain land as absolute owners, alleging that the land was mortgaged by the father of defendants with condition of foreclosure if the entire land or a part thereof was not redeemed within six years. The land was not redeemed and the plaintiffs on 7th December 1898 served defendants' father with a notice of foreclosure. The year of grace expired on 16th December 1899, and plaintiffs became absolute owners. The defence was that the original mortgagor on whom the notice was served had no right of ownership at the time, as the land in dispute was gifted by him to defendants on 30th January 1897 by a registered deed of gift which was witnessed by J. S., one of the mortgagees, and therefore the proceedings in connection with the notice of foreclosure were ineffective and void, as it should have been issued to the donees. In reply plaintiffs contested the gift alleging that the gift was not completed by delivery of possession. Both Courts below found in favour of defendants and dismissed the suit. On appeal the Chief Court

*Held* dissenting from *Muhi-ud-din v. Manohar Shah* <sup>(2)</sup> and *Ismail v. Ramji* <sup>(3)</sup>, that under Muhammadan Law a gift by a mortgagor of immovable property, of the equity of redemption was valid, placed the donee in the shoes of the donor and necessitated notice to the donee of foreclosure although the donor was still alive.

<sup>(1)</sup> 10 P. R. 1896, Rev.

<sup>(2)</sup> (1882) 1 L. R. 6 Bom. 650.

<sup>(3)</sup> (1899) 1 L. R. 23 Bom. 682.



*Further appeal from the decree of S. W. Gracey, Esquire, Divisional Judge, Ferozepore Division, dated the 9th April 1907.*

Sheo Narain, for appellants.

Lal Chand, for respondents.

The judgment of the learned Judge who referred the case to a Division Bench was as follows :—

SIR ARTHUR REID, C. J.—The question for consideration is whether a gift, by a mortgagor of immovable property, of the equity of redemption, the parties being Muhammadans, is valid and necessitates notice of foreclosure on the donee during the life-time of the donor. 15th Feb. 1910,

No authority of this Court more in point than *Partab Singh v. Fatta* <sup>(1)</sup>, cited by the Court of first instance, was cited at the hearing, and no special custom was cited for either party, the learned advocate for the respondents citing *Muhi-ud-din v. Manohar Shah* <sup>(2)</sup>, followed in *Ismail v. Ramji* <sup>(3)</sup>, as authority for the proposition that a gift by a mortgagor of land in possession of a mortgagee was invalid under Muhammadan Law. The parties to the gift dealt with in *Partab Singh v. Fatta* <sup>(1)</sup>, were Hindus, and the Bombay cases cited have been usually treated as authority for the proposition set up by the learned advocate for the respondents. At the same time doubt has been thrown on the correctness of the Bombay rulings in section 307 of Wilson's Digest of Anglo-Muhammadan Law, (Ed. II), and by Mahmud, J., at page 10 of *Rahim Bakhsh v. Muhammad Hussan* <sup>(4)</sup>.

The question was raised in the Court of first instance and by the second ground of appeal below, and is, in my opinion, of sufficient importance for reference to a Division Bench for an authoritative ruling.

I refer this appeal to a Division Bench accordingly. Very early date.

The judgment of the Division Bench was delivered by—

SIR ARTHUR REID, C. J.—The order of the 15th February 1910, referring this case to a Division Bench, will be read with this. As stated therein, the question for consideration is whether a gift, by one Muhammadan to another, of the equity of redemption of immovable property is valid and necessitates 12th July 1910.

<sup>(1)</sup> 45 P. R. 1906.

<sup>(3)</sup> (1889) I. L. R. 23 Bom. 682.

<sup>(2)</sup> (1882) I. L. R. 6 Bom., 650.

<sup>(4)</sup> (1888) I. L. R. 11 All. 1.

notice of foreclosure on the donee during the life-time of the donor. Of the authorities cited the following are not strictly in point :—

1. *Ibrahim Goolam Ariff v. Saiboo* <sup>(1)</sup>, in which it was held that the doctrine of *Mushaa* does not apply to shares in companies, or in free-hold property in a large commercial town. Their Lordships adopted the ruling laid down in *Muhammad Mumtaz Ahmad v. Zubaida Jan* <sup>(2)</sup>, that the doctrine relating to the invalidity of gifts of *Mushaa* is wholly unadopted to a progressive state of society and ought to be confined within the strictest limits.

2. *Muhammad Bakhsh Khan v. Hosseini Bibi* <sup>(3)</sup>, in which there was a gift by one woman of 24 villages to the infant children of another woman. The plea was that possession was not given. Their Lordships overruled this plea on the grounds that the gift was attended by the utmost publicity, that the deed of gift authorised the donees to take possession, and it appeared that they did in fact take possession. Their Lordships cited a case, X, of Macnaghten's Precedents, to the effect that although the widows of late owners at the time of the execution by them of a deed of gift of immovable property are not seised of it, yet if agreeably to the donor's desire, the donee, in pursuance of a judicial decree, becomes subsequently seised of the property, the fact of the donor's having been out of possession at the time of making the gift is not sufficient to invalidate it.

3. *Muhammad Esuph Ravutan v. Pattam sa Ammal* <sup>(4)</sup>, which dealt only with a '*Hiba-bil Iwaz*.'

4. *Mehrabi v. Tajudin* <sup>(5)</sup>, which dealt with the case of a gift of a house for the use of a *masjid*, and neither donor nor donee was ever in possession before or after gift. The house was in the possession of the donor's brother and descended to the donor's son.

In *Muhi-ud-din v. Manohar Shah* <sup>(6)</sup>, two Judges of the Bombay High Court held that a gift was invalid if the donor, at the time of making it, was merely owner of the property which she purported to give, the possession being with the mortgagee of the same. It was held that a sale would be valid though the gift was invalid. Campbell, J, dissented and held that the gift was valid.

<sup>(1)</sup> (1908) *I. L. R.* 35 *Cal.* 1 *P. C.*    <sup>(4)</sup> (1900) *I. L. R.* 23 *Mad.* 70.  
<sup>(2)</sup> (1889) *I. L. R.* 11 *All.* 460 *P. C.*    <sup>(5)</sup> (1889) *I. L. R.*, 13 *Bom.* 156.  
<sup>(3)</sup> (1888) 15 *I. A.* 81.                      <sup>(6)</sup> (1882) *I. L. R.* 6 *Bom.* 650.

The decision of the majority was followed by a Division Bench in *Ismail v. Ramji* <sup>(1)</sup>. The plea that the donor, having applied to the Revenue authorities to transfer the mortgaged property, subject to gift, into the name of the donee, had done all that she could to give possession to the donee, and that the requirements of the Muhammadan Law had been complied with, was overruled on the ground that the Muhammadan Law required that the donor should be in actual or at least constructive possession, and that he should give actual or at least constructive possession to the donee.

The VI Bombay case was dissented from in Article 307 of Wilson's Digest of Anglo-Muhammadan Law, Edition II, and the learned author expressed the opinion that the question whether a Muhammadan mortgagor can make a valid gift of his equity of redemption, in property of which the mortgagee is, at the time, in possession, was not really in issue, the Court not being called upon to decide whether an equity of redemption, being a kind of property not susceptible of physical possession, could be validly transferred by appropriate words of gift.

8. In *Rahim Bakhsh v. Muhammad Hassan*, <sup>(2)</sup> Mahmud, J., said that the VI Bombay case probably carried the law of seisin too far, as is suggested by Syed Amir Ali at page 70 of his Tagore Law Lectures, 1884. The learned Judge cited *Mullick Abdul Guffoor v. Maleka* <sup>(3)</sup>, and *Shahzadi Hazra Begum v. Khwaja Hussain Ali Khan* <sup>(4)</sup>.

In the X Calcutta case Garth, C. J., said at page 1123. "We have been referred to several authorities and amongst others to Durrul Mukhtar, Book on Gifts, page 635, which lays down that no gift can be valid unless the subject of it is in the possession of the donor at the time when the gift is made. Thus when land is in the possession of an usurper (or wrong-doer), or of a lessee or mortgagee, it cannot be given away, because in these cases the donor has not possession of the thing which he purports to give. But we think that this rule, which is undoubtedly laid down in several works of more or less authority, must, so far as it relates to land, have relation to cases where the donor professes to give away the possessory interest in the land itself, and not merely a reversionary right in it. Of course, an actual seisin or possession cannot be transferred, except by him who has it for the time being." The learned

<sup>(1)</sup> (1899) *I. L. R.* 23 *Bom.* 682.

<sup>(2)</sup> (1888) *I. L. R.* 11 *All.* 1.

<sup>(3)</sup> 1884 *I. L. R.* 10 *Cal.* 412.

<sup>(4)</sup> (1869) 12 *W. R.* 498.



C. J. went on to say' "What is usually called possession in "this country, is not actual or *khas*' possession, but the receipt "of rents and profits ; and if lands let on lease could not be made "the subject of a gift, many thousands of gifts, which have been "made over and over again of *zamindari* properties, would be "invalidated. If we were disposed to agree with this novel view "of Muhammadan Law (which we are not), we think we should "be doing a great wrong to the Muhammadan community, by "placing them under disabilities with regard to the transfer of "property, which they have never hitherto experienced in this "country. Such a view of the law is quite inconsistent with "several cases decided by the Sudder Dewani Adalat, (under "the advice of the *Kazis*, and also by this Court ; and it is directly opposed to the case of *Amirunnessa v. Abedoonissa* (1).

In the 12 W. R. case a Full Bench, including Peacock, C. J., held that the existence, at the time at which an endowment is made, of a mortgage of the endowed property, does not render the endowment invalid under the Muhammadan Law, and that the *mutawalli* is entitled to the surplus proceeds of the sale of property in execution of the decree on the mortgage deed. The following was cited from page 458 of the *Fatawa Alungeeri* :—

"If a man mortgages land, and then makes an endowment "of it previous to redemption of the mortgage, the endowment "shall be binding, and this shall not cancel the mortgage. If "the mortgage is redeemed after the land has remained some "years in the hands of the mortgagee, it shall revert to the "purpose to which it was appropriated. Should he, the endower "die and leave sufficient assets for redemption, the redemption "shall be effected, and the endowment shall be rendered "effectual."

At page 61 of *Amir Ali's Muhammadan Law*, Edition II, the learned author expresses the opinion that the decision of the majority in the VI Bom : case, is founded upon an erroneous apprehension of the Hanafi Law, under which *seisin* is requisite for hypothecation ; the correct view of the Hanafi doctrine on the subject being that there is nothing in it to preclude the mortgagor from granting his equity of redemption to another. The learned author adds that under the law of *hawalat* the debtor may transfer his liability to another, with the result that, as the property forms the security for the debt, the transferee obtains the right to redeem the property subject to the payment

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(1) (1875) 23 W. R. 208.

of the debt. Endowment is practically on the same footing as gift, and we have great respect for the opinions of Mahmud, J., and of Amir Ali on questions of Mubammadan Law. The remarks of Garth, C. J., and of their Lordships of the Privy Council, in XXXV Calcutta, are strongly in point, though the facts dealt with are not identical.

On the authorities cited we have no hesitation in differing from the decisions in VI and XXIII Bombay, and in holding that the gift was valid, placed the donee in the shoes of the donor and necessitated notice on the donee of foreclosure, although the donor was still alive.

For these reasons we dismiss this appeal with costs. The application, having been under section 70 (1) (b) of the Courts Act and having been admitted, became an appeal and should have been removed from the register of revisions.

*Appeal dismissed.*

### No 87.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.  
Mr. Justice Scott Smith.*

CHAUDHRI KHUSHI RAM,—(PLAINTIFF),—APPELLANT,

*Versus*

ASU RAM &C.,—(DEFENDANTS),—RESPONDENTS.

Civil Appeal No. 260 of 1910.

*Punjab Pre-emption Act, II of 1905, section 11 and proviso—Aroras of Multan not a sub-division of Khatri tribe—Onus probandi.*

*Held* that plaintiff on whom the *onus* lay had failed to prove that Aroras of the Multan District are a sub-division of Khatries and members of the same tribe within the meaning of the proviso to section 11 of the Punjab Pre-emption Act, 1905.

*Further appeal from the decree of S. S. Harris, Esquire, Divisional Judge, Multan Division, dated the 27th October 1909.*

Balwant Rai, for appellant.

Devi Dial, for respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—This judgment disposes also of appeal No. 261. The plaintiff respondent's suits for pre-emption have been dismissed on the ground that he is not a member of an agricultural tribe and does not belong to the same tribe as the vendor.

21st July 1910.

Plaintiff is an Arora and the vendor is a Khatri, and the sole question for decision before us is whether Aroras are a subdivision of Khatri and members of the same tribe within the meaning of the proviso to section 11 of the Punjab Pre-emption Act.

The parties belong to Shujabad in the Multan District, and the Lower Courts have based their decision upon the Gazetteer of that district compiled in 1901-02 by Mr. E. D. MacLagan, Settlement Collector. The various tribes and castes are tabulated and noticed in pages 125 to 128 of the Gazetteer. The Khatries and Aroras are classed as separate tribes and there is no mention of any claim on the part of the latter to be a subdivision of the former.

In Vol. XVII of the Census of India, 1901 (Report by H. A. Rose, I.C.S., Census Superintendent) at page 302 we find a heading "castes of Khatri type." The Khatri, Aroras and Bhattias are treated of under this heading and the fact that Aroras claim to be of Khatri origin is referred to. Mr. Rose, however, does not state his own opinion, but says at page 303, "This is 'one of the numerous points which require further investigation 'in connection with the history of the Punjab castes.'"

Mr. Bhattacharji in "Hindu Castes and Sects" at page 142 says "The Aroras claim to be Keshettris but other classes of "Keshettris neither eat with the Aroras nor inter-marry with "them."

We are not prepared to hold from the above that Aroras are Khatries, apparently some of them claim to be Khatries, but they do not appear to have definitely established their claim. Mr. Rose says (page 302 of his report) that they inhabit the south-west of the Punjab, where Khatries are hardly to be found at all, and the Gazetteer of the Multan District is a clear authority against the contention that they are of the Khatri tribe.

The *onus* was upon the plaintiff to prove that he was of the same tribe as the vendor and we consider that he has not discharged it. His appeals are dismissed with costs.

*Appeal dismissed.*



## No. 88.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

DHARA SINGH AND ANOTHER,—(PLAINTIFFS),—  
APPELLANTS,

*Versus*

TARA SINGH AND ANOTHER,—(DEFENDANTS),—  
RESPONDENTS.

Civil Appeal No. 669 of 1908.

*Custom Alienation—Bunjahi Khatries of mauza Nara, tahsil Kahuta, District Rawalpindi, do not follow agricultural custom in matters of alienation.*

*Held, that the Bunjahi Khatries of mauza Nara, tahsil Kahuta, District Rawalpindi (dhobi by occupation), do not follow agricultural custom in matters of alienation.*

*Further appeal from the decree of F. J. Kennedy, Esquire, Divisional Judge, Rawalpindi Division, dated the 24th March 1908.*

Gobind Das, for appellants.

Ishwar Das, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—The parties in this case are Bunjahi Khatries, being *dhobis* by occupation, of the village of Nara in *tahsil* Kahuta of the Rawalpindi District. The suit out of which this appeal has arisen was brought by plaintiffs for a declaration that the sale of a house, situate in Nara, effected by their first cousin, defendant No. 1, in favour of a stranger, defendant No. 2, was invalid and should not affect their reversionary rights. The first Court decreed the plaintiffs' claim, holding that the house in dispute was the ancestral property of the vendor, and that in matters of alienation of such ancestral property the parties were governed by agricultural custom under which the vendor's power of alienation in respect of ancestral property was restricted. On appeal, the Lower Appellate Court, while agreeing with the first Court that the house in dispute was ancestral, held that it was not proved that the parties were governed in matters of alienation by custom and not by Hindu Law, and holding that the plaintiffs had no power to contest the validity of the sale in dispute, dismissed their suit. 4th May 1910.

Before us it has been argued by the pleader for the plaintiffs-appellants that under the circumstances of the case the *onus* lay upon the defendant-vendee of proving that the parties were governed by Hindu Law and not by custom, and that even if the initial *onus* rested upon the plaintiffs to prove that

they were governed by custom, the proved facts of the case are sufficient to shift that *onus* on to the defendant-vendee, who, it is contended, has failed to discharge it. After giving every weight to the argument of the appellants' pleader, we have no hesitation in agreeing with the Lower Appellate Court in holding that in this case it was for the plaintiffs to prove that in matters of alienation their family was governed by an agricultural custom and not by Hindu Law, and that they have entirely failed to prove it. The parties are, as we have said above, Bunjahi Khatries and they are *dhobis* by occupation. Admittedly there is only this one family of Dhobi Khatries in the village of Nara, which is inhabited chiefly by Gakhars and possibly by other tribes. The family owns no land in the village; all that is proved is that the plaintiffs and the vendor hold small plots of land as occupancy tenants. The *patwari* says that the vendor has two *kanals* of land and the plaintiffs hold the same area, besides a joint *khata*, of which the area is not given, but which presumably is very small in extent. There is no evidence at all on the record to show that agriculture is the principal occupation of the parties or is the main source of their income; on the other hand, they appear to work as village washermen, and presumably they make their living as *dhobis*.

Some of the witnesses produced by the plaintiffs say in a general way that the parties are governed by custom, and they profess to cite some instances in which among Khatries, residing in the neighboring villages, daughters have been excluded from inheritance by the collaterals of their fathers. But not one of the instances cited has been supported by documentary evidence, and admittedly none relates to the parties' family. Conceding, however, for the sake of argument, that among the parties' caste daughters are excluded from inheritance by collaterals, and that to that extent Hindu Law has been modified by custom, it by no means follows that the parties have adopted the rules of agricultural custom under which the proprietor is precluded from alienating his ancestral house without the consent of his collaterals. In a case of this kind the adoption of such rules of custom by the parties, who *prima facie* belong to a non-agricultural tribe, has to be affirmatively proved by those who assert their existence; and we are quite clear that the plaintiffs in this case have failed to discharge this obligation.

Several rulings of this Court have been referred to in argument on both sides, *e. g.*, *Atar Singh v. Prem Singh* <sup>(1)</sup>, *Bura Mal v. Narain Das* <sup>(2)</sup>, and *Gokra v. Hari Ram* <sup>(3)</sup>, and *Mahammad Hayat Khan v. Sandhe Khan* <sup>(4)</sup>, and *Habib v. Fatta* <sup>(5)</sup>, but we think it unnecessary to discuss them in detail as the conclusion that we have come to is quite in accordance with the principles underlying those rulings.

We dismiss the appeal with costs.

*Appeal dismissed.*

### No. 89.

Before Hon. Mr. Justice Ryves and Hon. Mr. Justice  
Scott Smith.

DEVI DIAL,—(DEFENDANT),—APPELLANT,

*Versus*

MUHAMMAD AMIN,—(PLAINTIFF),— }  
SHEIKH IMAM DIN,—(DEFENDANT),— } RESPONDENTS.

Civil Appeal No. 780 of 1909.

*Punjab Pre-emption Act, II of 1905, section 3, sub-section (2) — Village immoveable property.*

I. D. sold a house situate in the *abadi* known as *Parao* Lala Musa to D. D. M. A., I. D., sson sued for pre-emption alleging that the *abadi* was part of a "village." It appeared that many years ago Government established a halting ground or *parao* in the immediate vicinity and constructed a number of shops. Since then the *bazar* had grown and a number of houses were built close by and, at time of suit, this *abadi* contained 143 residential houses and 110 shops. The land occupied by the *parao* belonged to *mauza* Dhaman and the *abadi* or *bazar* included land within the limits of that village as well as of the village of Said Gul. It was contended that the house was not "village immoveable property" nor subject to pre-emption inasmuch as the *abadi* *Parao* Lala Musa lay at a distance from what was generally known as the *abadi* of *mauza* Dhaman and Said Gul.

*Held* by the Division Bench that if extensions are made to the existing *abadi* of a village or if a hitherto unoccupied site within the boundaries of the village is built over and settled upon such new buildings it would become "village immoveable property."

*Held* by Ryves, J., that the word "village" in section 3, sub-section (2) *Punjab Pre-emption Act, II of 1905*, does not mean a collection of houses but means the whole estate or *mauza* and includes everything within the boundaries of the village area.

*Held* also by Ryves, J. (Scott Smith, J., dissenting) that the definition in this sub-section applies to all immoveable property within the limits of a village.

<sup>(1)</sup> 12 P. R., 1906.

<sup>(2)</sup> 102 P. R., 1907.

<sup>(3)</sup> 115 P. R., 1907.

<sup>(4)</sup> 55 P. R., 1908.

<sup>(5)</sup> 69 P. R., 1909.



Held by Scott Smith, J., that the expression "village site" in the above sub-section could not be considered synonymous with "village" or "estate" but meant the inhabited part of the village or "*abadi deh*."

*Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 14th January 1909.*

Sangam Lal, for appellant.

Fazal-i-Hussain, for respondents.

The judgment of the Court was delivered by

11th July 11910.

RYVES, J.—This appeal raises a novel point in the law of the pre-emption applicable to this Province.

On the 27th April 1906 one Imam-ud-din sold his house in the *abadi* known as *Parao Lala Musa* to the defendant appellant.

The plaintiff-respondent is the vendor's son, and he brought this suit against the vendee (defendant-appellant) for possession of the house, by pre-emption, alleging that the *abadi* where this house was situated was part of a "village" as it had been built on lands partly within the limits of *mauza* Dhaman and partly within the limits of *mauza* Said Gul.

The chief defence to the suit was that *Parao Lala Musa* was a town and that the custom of pre-emption did not exist in it.

In both the Lower Courts the point at issue was "Is *Parao Lala Musa* a town or not"? Both the Courts have held that it is not a "town," and having regard to sub-section (3) of section (3) of the Punjab Pre-emption Act of 1905, it certainly is not a "town."

Now it is admitted that *Parao Lala Musa* is not a "village" within the meaning of the said Act. It appears that many years ago Government established a halting ground or *parao* in the immediate vicinity and constructed a number of shops. Since then the *bazar* has increased and a number of houses have been built close by, so that at the time of suit, this *abadi* contained 143 residential houses and 110 shops. The land occupied by the *parao* belonged to *mauza* Dhaman and the *abadi* or *bazar* includes land within the limits of that village as well as of the village of Said Gul.

The plea that this house is situated in "a town" and is therefore "urban immoveable property" has been abandoned in this Court. But it is argued, for the first time here, that nevertheless the house is not "village immoveable property" and is, therefore, not subject to pre-emption. The argument turns entirely on the meaning to be given to the words "within the limits

of village sites" in sub-section (2) of section 3 of the present Punjab Pre-emption Act. It is said that "village site" means the *abadi*. And inasmuch as "*abadi Parao Lala Musa*" lies at a distance from what is generally known as the *abadi* of *mauza Dhaman* and of *mauza Said Gul*, it is argued that "the *abadi*" in suit does not come within the definition. This argument suggests that there may be within the area of a village immoveable property which is incapable of being pre-empted and which falls neither within the definition of "agricultural land" nor "village immoveable property," or in other words that the definitions in section 3 of the Act are not exhaustive. In my opinion to give such a limited construction to the term "village immoveable property" would be against the scope of the Act.

I think the definition in sub-section (2) applies to all immoveable property within the limits of a village and that it is not confined to immoveable property actually within the existing *abadi* of a village. To hold otherwise would be to imply that the right of pre-emption would be confined to existing areas, and would not apply to any extension of buildings outside such areas, and that the Legislature purposely so limited its operation. I think the word "village" in this section does not mean merely a collection of houses, but means the whole estate or *mauza*, and includes everything within the boundaries of the village area.

In many villages the populated portions, *i.e.*, portions which are *abad*, are situated at a distance from each other either for topographical reasons of convenience or for reasons of caste, yet I think it cannot be doubted that if extensions are made to the existing *abadi* of a village, or if a hitherto unoccupied site within the boundaries of the village is built over and settled on, such new buildings would become "village immoveable property," and as such, would come within the operation of sub-section (2). Two rulings, *i.e.*, *Ram Narain Singh v. Sewak Ram* <sup>(1)</sup> and *Muhammad Din v. Shah Din*, <sup>(2)</sup> have been quoted in support of appellant's arguments, but neither has much application to this case. In the first place both of them were decided with reference to the repealed sections of the Punjab Laws Act of 1872. In the case in *Muhammad Din v. Shah Din* <sup>(2)</sup> the decision turns on its own facts as expressly stated in the judgment. The learned Judges say:—

"We may assume that to a considerable extent the quarter known as Killa Gujar Singh, even to this day constitutes a village and contains a village community."

(1) 21 P. R. 1908.

(2) 90 P. R. 1907.

" There is within its boundaries a fairly large area of agricultural land which is assessed to land revenue, and there are also the ordinary village *abadi*, ordinary village proprietary body, the ordinary village officers, a record of rights, etc. It may, therefore be that Killa Gujar Singh in part at all events, retains its former character as a village community. It may be so, but upon this point we are not called upon to give any definite opinion as we decided this case purely on its own facts. Upon these facts we are satisfied that the present land in suit does not in reality now form part of the old village of Killa Gujar Singh."

And they go on to find that the area in question has been absorbed within the limits of Lahore City, and it was on this view of the case, that it was held that no presumption arose in favour of plaintiff's claim and that it was for him to prove that in the sub-division in question of Lahore City the custom of pre-emption existed and that he had failed to establish this.

The case in *Ram Narain Singh v. Sowak Ram* <sup>(1)</sup>, is still less applicable. There it was held that a particular *chak* in the Canal Colony had not yet become a village within the meaning of section 10 of the Punjab Laws Act. As in that case it was held that it was possible for the *chak* in question to become a village at some future date, so in the present case it is quite possible that *Parao Lala Musa* may in the future become a town within the meaning of the present Punjab Pre-emption Act, but we must hold that at present, until *abadi Parao Lala Musa* has been separated from and ceased to be a part of the estate of *mauzas Dhaman* and *Said Gul*, it remains a part of these villages.

I would therefore dismiss the appeal with costs.

11th July 1910.

SCOTT SMITH, J.—The question at issue in this case is whether a shop situated in a *bazar* at the *Lala Musa* camping ground is subject to the right of pre-emption.

In the Lower Courts the defendant's contention was that the property in dispute was "urban immoveable property," *Lala Musa* being a town. The Courts, however, found it to be not a town, and this finding has not been contested before us.

Here for the first time it has been contended that the property, though not "urban immoveable property" is also neither "agricultural land" nor village "immoveable property" as defined in section 3 of the Punjab Pre-emption Act. In other words it is

(1) 21 P. R. 1906.



argued that the definitions in this section do not include every kind of immoveable property.

The Legislature may have intended the definitions to be exhaustive, but the only question we have to decide at present is whether the property in dispute is "village immoveable property" within the definition as given.

Mr. Shadi Lal in his Commentary on the Pre-emption Act says at page 13 in regard to sub-section (2) of section 3 "This definition is very simple. Every immoveable property within the limits of a village, which is not agricultural land, shall be called village immoveable property."

The definition however refers to immoveable property within the limits of "village sites" and not within the limits of "villages." I do not think that the expression "village site" can be considered synonymous with "village" or "estate." It is not defined in the Act, but I take it to mean the inhabited part of the village or "*abadi deh*." The latter are the words used in the Urdu translation of the Act. As at present advised, I am therefore unable to agree with my learned brother that the definition in sub-section (2) applies to all immoveable property within the limits of a village. It is however not necessary for the purposes of this case to decide this question definitely for I agree with my brother in holding that the *bazar*, where the property is situated, is part of the village sites of Dhaman and Said Gul villages. I see no good ground for holding that village site means only the original "*abadi deh*" and does not include new buildings or *bazars* which spring up on the village lands, even though separate from the original "*abadi deh*."

I concur in the proposed order dismissing the appeal with costs.

*Appeal rejected.*

### No. 90.

*Before Hon. Mr. Justice Scott-Smith.*

BAIJ NATH AND OTHERS,—(DEFENDANTS),—APPELLANTS,

*Versus*

GULAB DIN,—(PLAINTIFF),— } —RESPONDENTS.  
AND ANOTHER,—(DEFENDANT),— }

Civil Appeal No. 581 of 1910.

*Custom Alienation—Khokhars of Gujrat.*

*Held* that in matters relating to alienation Khokhars of the town of Gujrat (who are not dependent upon agriculture as a means of livelihood) do not follow custom but Muhammadan Law.

*Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelam Division, dated the 10th June 1909.*

Nanak Chand, for appellants.

Abdul Qadir, for respondents.

The judgment of the learned Judge was as follows :—

26th May 1910.

SCOTT SMITH, J.—This has been admitted as a further appeal under section 70 (1) (b) of the Punjab Courts Act. The important question involved is whether Khokhars who live in the town of Gujrat and who do not live by agriculture are governed by custom in matters relating to alienation.

I note that the application for revision was also under clause (a) of section 70 (1), but there is no ground for holding that the Lower Courts have acted with material irregularity and I decline to consider the application as under clause (a).

The Lower Court's findings on the questions of plaintiff's relationship to Nawab, deceased, husband of Mussammat Fateh Bibi and of necessity must therefore be accepted.

The Courts have however assumed that because the parties are Khokhars they must of necessity follow the customs of agriculturists. It was held in *Jamiat-ul-Nisa v. Hashmat-ul-Nisa* (1) that Awans of Ludhiana City, who were for generations past dependent upon service or other independent means of livelihood were governed in matters of succession by Muhammadan Law and not by custom. In *Muhammad Hayat Khan v. Sandhe Khan* (2) it was laid down that the presumption in favour of an unrestricted power of alienation of ancestral property as laid down in *Gujar v. Sham Das* (3) applies only to members of agricultural tribes, who are members of village communities, and whose main occupation is agriculture, and not to those who have altogether drifted away from agriculture as their main occupation, and have settled for good to urban life and have adopted trade, industry or service as their principal occupation and means of livelihood.

This is a very important ruling and its provisions are applicable to the present case, where the parties are not agriculturist or members of a village community, but live in a city and earn their livelihood by service. There is thus no ground for holding that the parties follow the customs of agriculturists in matters of succession, alienation and so on.

It was urged that according to strict Muhammadan Law Mussammat Fateh Bibi would not have succeeded as an heir

(1) 124 P. R. 1908.

(2) 107 P. R. 1887.

(3) 55 P. R. 1908.

to the whole of the property in dispute. That no doubt is true. At the same time her husband died 15 years ago and she has been ever since in possession as owner, and her possession has been adverse to the whole world. As the parties are not bound by custom, the plaintiff has no *locus standi* to contest the alienation made by her. The presumption is that she is in possession as absolute owner of the property and cannot be controlled in matters of alienation.

I therefore accept the appeal and setting aside the orders of the Courts below dismiss plaintiff's suit with costs throughout.

*Appeal accepted.*

**No. 91.**

*Before Hon. Mr. Justice Scott-Smith.*

MADHO RAM,—(DEFENDANT),—PETITIONER,

*Versus*

BADAR-UD-DIN,—(PLAINTIFF),—RESPONDENT.

Civil Revision No. 727 of 1909.

*Public policy—Dustoori or commission.*

*Held*, that a claim for *dustoori* or commission on purchases is unlawful as being immoral and opposed to public policy.

*Petition under section 25 of Act IX of 1887 for revision of the order of Khawaja Tassudduq Husain, Judge Small Cause Court Delhi, dated the 21st January 1909.*

Sohan Lal, for petitioner.

Abdul Qadir, for respondent.

The judgment of the learned Judge was as follows:—

SCOTT-SMITH, J.—This was a suit for Rs. 68-2-0 as "*dustoori*" 2nd May 1910. or commission due to plaintiff on purchases of mortar from the defendants.

No specific agreement was proved though alleged in the plaint, but the Court found that by custom *dusturi* was payable and decreed the claim.

I am quite unable to regard an agreement to pay *dustoori* as lawful, for I consider it to be immoral and opposed to public policy. If dealers choose to submit to the payment of *dustoori* that is their own business, but I do not think the Courts should help persons to recover sums claimed as such.

The custom is an immoral one which cannot be recognised by the Courts. I therefore accept the revision and setting aside



the Lower Courts' order, dismiss plaintiffs claim, but as the plea of the agreement or custom being not enforceable was not raised in the Court below, I leave the parties to bear their own costs.

*Revision accepted.*

**No. 92.**

*Before Hon. Mr. Justice Johnstone.*

BEHARI LAL AND OTHERS—(PLAINTIFFS),—PETITIONERS

*Versus*

KALU,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 1702 of 1908.

*Indian Limitation Act, IX of 1908, section 181, revision—limitation for—*

On the 25th April 1905 the Small Cause Court, Sialkot, dismissed plaintiffs' suit for *virt*. On appeal the District Judge remanded the case and the Small Cause Court then decreed the claim which however was dismissed on appeal to the District Judge. On revision the Chief Court held that no appeal lay to the District Judge and restored the order of the first Court. Plaintiffs then applied to the Chief Court for revision of the order of the first Court so restored and was met by the objection that his revision was long barred by time.

*Held*, by the Chief Court that the situation was anomalous but that revision was barred by time under article 181 of the new Limitation Act, 1908, as also article 178 of the old Act.

*Petition, under section 25 of Act IX of 1887, for revision of the order of Lala Maya Ram, Munsif, 2nd class, empowered as a Judge, Small Cause Court, Sialkot, dated 25th April 1905.*

M. N. Mukerjee, for petitioners.

Dhanpat Rai, for respondent.

The judgment of the learned Judge was as follows :—

4th May 1910.

JOHNSTONE, J.—On the 25th April 1905 the Small Cause Court, Sialkot, dismissed plaintiffs' suit for Rs. 25 on account of *virt*. Appeal was made to the District Judge, who remanded under section 562, Civil Procedure Code (old). On retrial the Small Cause Court again decreed for plaintiff, but on appeal the District Judge dismissed the suit. Plaintiff then came here on revision against the District Judge's order, and this Court held that no appeal lay to the District Judge and restored the order of the First Court, *i. e.*, the first decision dismissing the suit.

Plaintiff now comes up on revision as against the order of the First Court as restored, and is met by the objection that the revision is long barred by time. The situation is an

anomalous one, but I fear the law is against the petitioner. Article 178 of the old Limitation Act and article 181 of the new are quite clear and give three years from the time when the right to apply for revision arose, which was of course on 25th April 1905. No provision of law helps the petitioner here. Section 5 of the Act applies only to appeals and reviews, and section 14 allows only of deduction of time spent in making other applications in good faith, whereas here the application was one for revision and the time sought to be deducted is the time spent in appeals. No doubt in the course of the proceedings there was a previous revision in Chief Court but it was not an application for the same relief as asked for here.

It is also said that one petitioner was and is a minor and so section 7 saves him; but Suraj Bhan, his predecessor, was alive in April 1905 and so time began to run and could not stop at his death.

I dismiss the petition with costs.

*Revision rejected.*

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**No. 93.**

*Before Hon. Mr. Justice Johnstone.*

SAWAN SINGH AND ANOTHER,—(DEFENDANTS),—  
APPELLANTS.

*Versus*

KARIM BAKSH,—(PLAINTIFF),—RESPONDENT.

Civil Appeal No. 860 of 1909.

*Indian Evidence Act, I of 1872, section 90, Ancient document.*

*Held* that section 90, Indian Evidence Act, 1872, is not limited to cases in which the document is actually produced in Court and consequently secondary evidence of an ancient document is admissible without proof of the execution of the original when the document is shown to have been lost and to have been last heard of in proper custody.

*Further appeal from the decree of Khan Bahadur Abdul Gafur Khan, Khan of Zaida, Divisional Judge Sialkot Division, dated the 24th April 1909.*

Sukh Dial, for Appellants.

Shircore and Roshan Lal, for respondent.

The judgment of the learned Judge was as follows:—

JOHNSTONE, J.—In this case, the plaintiff sued for redemption of a mortgage on payment of Rs. 41-8. The defendants replied 19th May 1910, that in addition to the burden of Rs. 41-8 the original mortgagor had by a mortgage without possession, burdened the land with

an additional sum of Rs. 77 by a registered deed of 4th June 1874. In replication plaintiff argued that the law of Limitation prevented the defendants from relying upon this further deed of mortgage, and he also pleaded on another ground that the second deed of mortgage was invalid. The first Court came to the following findings:—

- (i) that the plaintiff's father did execute the mortgage deed of 4th June 1874 for Rs. 77 ;
- (ii) that the original mortgage deed has been proved to be lost ;
- (iii) that therefore secondary evidence of its contents may be given ;
- (iv) that inasmuch as the original deed was more than 30 years old the presumption regarding it described in section 90 of the Indian Evidence Act may be made ;
- (v) that the mortgage of 1874 is not invalid by reason of section 257 A of the old Civil Procedure Code inasmuch as the sum of Rs. 77 aforesaid is not in excess of the amount of the decree which the mortgagee held against the mortgagor ; and
- (vi) that the law of limitation did not affect that mortgage.

Finally the First Court gave plaintiff a decree for redemption on payment of Rs. 418-8. The plaintiff appealed to the Divisional Court which took a totally different view of the case and finally gave plaintiff a modified decree for redemption on payment of Rs. 41-8 only.

The defendants have filed a further appeal in this Court and in my opinion that appeal must succeed. The Divisional Judge's way of looking at the case seems to me wholly incorrect. He began by holding that the loss of the original document of 1874 was not sufficiently proved. In connection with this it is only necessary to observe that the plaintiff in his written replication and also in the oral statement made in answer to defendants' pleas never challenged the assertion that the deed was lost. In these circumstances the First Court seems to me to have done its duty when it accepted as sufficient the formal evidence tendered by the defendants as to the loss of the



document, namely, the deposition of one Gurditta who seems to be a respectable and independent person

Next, the learned Divisional Judge laid it down that section 90 of the Evidence Act relates only to originals and not to copies and that therefore there can be no legal presumption in defendants' favour about the genuineness of the original document of 1874. This in my opinion is bad law. No doubt the section does not expressly deal with a case like the present; but I am inclined to agree with the dictum in *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* (1) followed in *Ishri Prasad Singh v. Lalli Jus Kunwar* (2) to the effect that the words "Where any document \* \* \* \* is produced" do not limit the operation of the section to cases in which the document is actually produced in Court, and consequently secondary evidence of an ancient document is admissible without proof of the execution of the original when the document is shown to have been lost and to have been last heard of in proper custody. To rule otherwise would, in my opinion, be to misunderstand the policy of the Legislature in these matters. The obvious intention of section 90 of the Indian Evidence Act is not to make it too difficult for persons relying upon ancient documents to utilise those documents in proving their cases, and, if the section is not to be applied to cases where the original is lost, that policy is not fully carried out; for when the original is lost, it is doubly difficult for the party concerned to prove the execution and hand-writing and so on. Therefore in the present case the genuineness of the original mortgage-deed of 1874 is, to my mind, not in the least doubtful.

After this the learned Divisional Judge loses himself in a wilderness of conjectures and surmises. He talks of possibilities that the original mortgage-deed was returned to Fazla, the money having been paid. But does the plaintiff even suggest in his replication or in the subsequent statement made by him that anything of this kind happened?

It does not seem to me to be right for a Judge to base his decision in favour of the plaintiff on conjectures as to matters of fact which have nowhere been alleged by the plaintiff.

Next the Divisional Judge points out that defendants never obtained mutation under the mortgage-deed in question; but

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(1880) I. L. R. 5 Cal. 886.

(2) (1900) I. L. R. 22 All. 294.

if that officer had consulted Rule 46, Chapter V of the Rules under section 28, 29, 46 and 155 (d) of the Punjab Land Revenue Act, he would have seen that collateral mortgages are never entered in the mutation register at all. This mortgage was not a mortgage with possession, and therefore no mutation of it was possible.

Proceeding further the Divisional Judge then states that the income from the land was certainly much in excess of what the defendants could have obtained as interest for the whole of the principal debt. This may be true or not; but there is on the record absolutely no foundation for the statement.

As regards limitation against defendants, I cannot see that limitation ever began to run against them. There was no occasion for them to sue to enforce a valid mortgage without possession.

In short, it seems to me that the decision of the First Court was quite sound. There is no doubt about the validity or genuineness of the mortgage-deed of 1874 and there is no doubt that it has not been paid off or cancelled in any way. Therefore the plaintiff cannot redeem the land without paying the principal money on both the mortgage-deeds and the interest on the second mortgage deed. I therefore accept the appeal, set aside the judgment and decree of the Lower appellate Court and restore the decree of the First Court and I direct that the plaintiffs do pay the costs incurred by the defendants in all the Courts.

*Appeal allowed.*

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**No. 94.**

*Before Hon. Mr. Justice Williams.*

NIADAR MAL, &C,—(PLAINTIFFS),—PETITIONERS,

*Versus*

MR. E. N. W. LEWIN,—(DEFENDANT),—RESPONDENT.

Civil Revision No. 2075 of 1909.

*Landlord and tenant--notice to quit.*

Where a tenant gave notice to his landlord that he would vacate on the 31st October 1908 but for some reason was unable to do so though the landlord took partial possession on the 30th October and after the tenant had vacated re-entered the vacant tenement.

*Held*, that the landlord was entitled to a new notice or failing this to a month's rent

*Application under section 25 of Act IX of 1887 for revision of the order of Khwaja Tasaddaq Hussain, Judge, Small Cause Court, Dehli dated the 12th August 1909.*

Harnam Das, for petitioners.

Oertel, for respondent.

The judgment of the learned Judge was as follows :—

WILLIAMS, J.—I do not think this judgment of the Lower Court can be upheld. When owing to whatever reasons Mr. Lewin found himself unable to give up possession absolutely and entirely on 31st October 1908, the land-lord became entitled, if he chose to press for it, to a new notice or failing this to a month's rent. The mere fact that he got partial possession on the 30th and that after Mr. Lewin had finally departed the land-lord re-entered the vacant tenement would not by itself do away with the necessity for notice unless there was some distinct understanding come to on the subject, the burden of proving which is on defendant. If it had been shown that plaintiff had dismissed defendant's *chaukidar* as stated by Muhammad Ismail, but denied by plaintiff, I should have held differently, because that would have indicated that the plaintiff was not making entry simply into a vacant house to prevent its being derelict.

I hold therefore that plaintiff is entitled to two months' rent Rs. 130-7. I disallow interest, and as I think that the plaintiff has pressed his rights to a somewhat extreme limit, I leave the parties to bear their own costs throughout.

*Revision accepted.*

### No. 95.

*Before Hon. Mr. Justice Rattigan.*

KISHEN CHAND,—PETITIONER,

*Versus*

E. D. SASSOON & Co.—RESPONDENTS,

Civil Miscellaneous No. 89 of 1910.

*Insolvency Act III of 1907, sections 13 and 16 (2), Power of Insolvency Court prior to order of adjudication.*

*Held* that an Insolvency Court has no jurisdiction prior to the order of adjudication to order the release of an applicant for insolvency who has rightly or wrongly been committed to prison by a Civil Court in execution of a decree and that before any order of adjudication is made the ordinary rights of a creditor to proceed against the person and property of a judgment-debtor remain unaffected.



*Application under Order XLVII, rule 1 by the respondent for review of the order of the Hon' Mr. Justice Rattigan, dated the 15th February 1910.*

Pestonji Dadabhai, for petitioner.

Beechey, for respondent's.

The order of the learned Judge was as follows:—

19th March 1910. RATTIGAN, J.—The judgment-debtor Kishen Chand, has applied for a review of my order, dated the 15th February last, which was passed *ex parte*, as neither he nor any person representing him was present on that occasion. He explains that he intended to travel to Lahore by the Bombay mail from Delhi to Lahore on the night of the 14th February, but that by accident he missed that train and was therefore unable to arrive in Lahore on the last date of hearing. I am by no means satisfied with this explanation as it is obvious that he could, had he taken any trouble in the matter, have caught the later Calcutta mail. But as the question involved is one of some importance, I decided to reopen the case and to hear what his learned counsel had to argue on his behalf. I have now had the advantage of hearing Mr. Beechey's arguments in support of the views of the Divisional Judge, but I confess I can see no reason for setting aside my former order.

Mr. Beechey argues that the order of the District Judge, dated the 25th November directing the imprisonment of the judgment-debtor was illegal. He points out that on the 11th August the judgment-debtor, when brought under arrest before the District Judge (who was executing the decree) expressed his intention of applying to be made an insolvent. Upon this the District Judge directed the release of the judgment-debtor, and on the 30th August the latter actually presented an application to the Insolvency Court. This application was however, not presented and was eventually dismissed in default, and it was not until the 18th November that the judgment-debtor again applied to the Insolvency Court. This application was admitted on the 23rd November and the petitioner was called upon by the said Court to furnish security under section 13 of Act III of 1907. Meanwhile the decree-holder had applied to the District Judge to have the judgment-debtor arrested, and as a result, the latter was arrested and imprisoned on the 25th November.

Mr. Beechey argues that once the judgment-debtor applied to be made an insolvent, (as he did on the 30th August) all prior proceedings in the District Judges' Court must be regarded as having terminated, and that it was consequently not open to the District Judge to order the imprisonment of the judgment-debtor on the 25th November without giving him a fresh opportunity to apply to the Insolvency Court, and in support of this argument the learned counsel relies upon section 15 and order 21, rule 37, of the Civil Procedure Code. I find it quite unnecessary to deal with this aspect of the question, as the sole point before me is whether the Insolvency Court acting under the provisions of Act III of 1907, had jurisdiction to order the release of a judgment-debtor who had been imprisoned under the orders of the Court executing the decree. For the sake of argument, it may be conceded that the latter order was illegal. Assuming it was, what power had the Insolvency Court to set it aside, and to direct the release of the judgment-debtor? There is no provision in Act III of 1907 which confers this very extraordinary power upon the Insolvency Court, and there can be no doubt that under the law obtaining prior to the enactment of the said Act, the Insolvency Court had no such jurisdiction, *In re Quarrie* (1). But not only is there no provision in the Act to that effect, there are certain provisions in it which conclusively show that, *prior to adjudication*, the right of the decree-holder to proceed against the person and property of his debtor remain unaffected. It is, for example, clear from the provisions of section 16 (2) of the Act that is only when an order for adjudication is made, that (1) the insolvent, if in prison for debt, shall be released, and (2) *thereafter* no creditor to whom an insolvent is indebted in respect of any debt payable under the Act, shall during the pendency of the insolvency proceedings have any remedy against the property or person of the insolvent in respect of the debt. Obviously, therefore, before any order of adjudication is made, the ordinary rights of the creditor are not taken away. Mr. Beechey's argument goes to the extent of claiming for the Insolvency Court a jurisdiction to set aside all orders of other Courts, (no matter what those Courts might be) as soon as the insolvent has preferred his application to be declared an insolvent. I cannot find anything in the Act which lends support to this argument whereas the provisions of section 16 of the Act appear to me to be entirely opposed to it.

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(1) (1885) I. L. J. 8 Mad. 503.

The judgment-debtor may or may not have the right to contest the legality of the order of the District Judge, dated 25th November 1909, but that question is not now before me. I have only to consider whether it is open to the Insolvency Court, acting under the provisions of Act III of 1907, to direct the release of a judgment-debtor who has been imprisoned (rightly or wrongly) in execution of decree by an order of the Court executing the decree, and this, too, prior to the Insolvency Court's order of adjudication under section 16 of the Act. Upon this question I have no doubt that the Insolvency Court has no such jurisdiction. I accordingly set aside my *interim* order, dated the 28th February 1910, and restore my order, dated 15th February 1910.

The judgment-debtor must pay the costs of these proceedings in this Court

### No. 96

*Before Hon. Sir Arthur Reid, Kt, Chief Judge, and Hon. Mr. Justice Scott Smith.*

FEROZE-UD-DIN—(DEFENDANT)—APPELLANT

*Versus*

RAHIM BAKHSH—(PLAINIFF)—RESPONDENT.

Civil Appeal No. 1005 of 1909.

*Custom pre-emption—existence of—town Kunjah, district Gujrat—conversion of tawela into serai—Punjab Courts Act, XVIII of 1884, section 70 (1) (b)—Sufficient important question of law—value of instances cited.*

*Held*, that a custom of pre-emption exists in the town of Kunjah, district Gujrat.

*Held* also, that the mere fact that some of the rooms are rented out to more or less permanent tenants and others to chance-visitors does not necessarily convert what was originally a *tawela* into a *serai*.

*Held* also, that in pre-emption cases the question whether a certain building is or is not on the facts found by the Lower Appellate Court a *serai*, is a question of law and of sufficient importance to justify the admission of an appeal under section 70 (1) (b) of the Punjab Courts Act, 1884.

*Held* further, following *Ramjas v. Bura Mul* <sup>(1)</sup> and *Muhammad Nawaz Khan v. Mussimmat Bobo Sahib* <sup>(2)</sup> that the admission of plaintiff's right by the defendant does not render the case valueless as a precedent in favour of the existence of a custom.

*Further Appeal from the decree of Sheikh Inam Ali, Divisional Judge, Jhelum Division, dated the 5th December 1908.*

Muhammad Shafi and Kamal-ud-Din for Appellant.

Shadi Lal for Respondent.

<sup>(1)</sup> 42 P. R. 1905.

<sup>(2)</sup> 44 P. R. 1903.



The judgment of the Court was delivered by —

SCOTT-SMITH, J.—This is an appeal under section 70 (1) (b) 2nd August 1910. of the Punjab Courts Act. It was admitted on the following grounds :—

(1) Whether the custom of pre-emption prevails in the town of Kunjah ?

(2) Whether the property in suit is a *serai*, within the meaning of section 13 (2) of the Punjab Pre-emption Act ?

Mr. Shadi Lal raised a preliminary objection to the effect that the question, whether a certain building was a *serai*, was not one of law and was not important.

The word *serai* is not defined in the Pre-emption Act, but we are clear that the question, whether a certain building, upon the facts as found by the Lower Courts, is or is not a *serai* is one of law. It is also of sufficient importance to justify admission under section (70) (1) (b). We therefore overrule the preliminary objection.

The Courts below have found that the property in dispute is not a *serai* and we agree with them. It was not built as a *serai* and there has been no prolonged unmistakeable use of it as such. The mere fact that some of the rooms are rented out to more or less permanent tenants and others to chance-visitors occasionally does not necessarily convert, what was originally a *tawela* into a *serai*. There are some very pertinent remarks in *Mussammat Nur Jahan v. Aziz-ud-Din* (1) at page 505. That was a case of pre-emption and a very similar question arose, whether a certain building had become a *katra* or *serai*. In *Kishen Singh v. Jai Kishen Das* (2) the facts were quite different.

The most important question in this case is, whether the custom of pre-emption prevails in the town of Kunjah ?

Previous instances, where the custom of pre-emption has been held or admitted to exist in the town of Kunjah, have been cited as follows :—

1. *Tara Singh v. Ladhu Singh* decided on 23rd February 1883. Plaintiff was given a decree upon defendant's confession of judgment.

2. *Gurdas Ram v. Prabh Dyal* decided on 23rd February 1892.—The existence of the right was at first denied, but arbitrators arranged a compromise and the plaintiff was given a decree.

(1) 108 P. R. 1895.

(2) 2 P. R. 1903.

3. *Guranditta v. Mussammat Jawala Devi* decided after a contest by Rai Bahadur Ganga Ram, Honorary Extra Assistant Commissioner, on 7th March 1896. It was held that the custom of pre-emption existed in the town of Kunjah.

4. *Hayat Muhammad v. Hayat Bakhsh and others* decided on 19th August 1901.

Defendant admitted the plaintiff's claim. Nur Din, who was plaintiff's *mukhtar* in that case, is *mukhtar* of the defendant in the present case.

5. *Hussan Muhammad v. Miran Bakhsh* decided after contest by Rai Bahadur Dilbagh Rai, Honorary Extra Assistant Commissioner, on 23rd May 1903. The custom of pre-emption was found to exist.

Not a single instance has been cited by the defendant, where it was held that the custom did not exist.

Mr. Shafi asks us to disregard instances Nos. 1, 2 and 4 in the above list, on the ground that there was no judicial decision as to the existence of the custom. He refers us to *Rama Mal v. Bhagat Ram* <sup>(1)</sup> in which at p. 67 the learned Judges say: "The admission of plaintiff's right by the defendant renders the case valueless as a precedent regarding custom."

We do not however think such instances altogether valueless, and the same view was taken in *Ramjas v. Bura Mal and others* <sup>(2)</sup> where in 6 out of 7 instances cited, the existence of the custom was either admitted or assumed. Such instances were also held to be relevant in *Muhammad Nawaz Khan v. Mussammat Bobo Sahib* <sup>(3)</sup> (page 154 of the Record).

Kunjah is a small town and one cannot expect to find many instances. In the only 2 contested cases, which appear to have occurred, it has been held that the custom of pre-emption exists, and in 3 other cases the plaintiff's claim was admitted. In the absence of any instance on the other side, we consider that the above are sufficient to warrant the finding of the Courts below that the custom does exist.

The appeal therefore fails and is dismissed with costs.

*Appeal rejected.*

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<sup>(1)</sup> 17 P. R. 1895.

<sup>(2)</sup> 42 P. R. 1905.

<sup>(3)</sup> 44 P. R. 1903.

## No. 97.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Williams.*

MUSSAMMAT NEHAL DEVI—(PLAINTIFF)—APPELLANT.

*Versus*

KISHORE CHAND AND OTHERS—(DEFENDANTS),—  
RESPONDENTS.

Civil Appeal No. 591 of 1907.

*Hindu family—Partnership—Dissolution by death of partner—Indian Contract Act, IX of 1872, sections 238 and 253 (10)—Suit by widow of deceased partner for account and share in specific assets—Limitation—Indian Limitation Act, XV of 1877, Article 106—Khatris—Presumption of jointness—Disruption and re-union of some members—Hindu law—Status of widow—Self-acquired property—Res judicata—Application of old or new Code of Civil Procedure—General Clauses Act X, of 1897, section 6—Profits in land—Jurisdiction of Civil Court—Punjab Tenancy Act, XVI of 1887, section 77 (3) (K).*

*Held*, that where the allegations for the plaintiff, the widow of a deceased member of a Hindu family (though not a joint family) were, that her husband's father was the sole proprietor of a business and had gifted to each of his two nephews (the defendants) a share in the business and they had allowed such shares to remain in the business ever since, and it was not denied that they were all entitled to a share in the profits of the business to the extent of their respective shares, the relationship thus created is a partnership as defined in section 238, Indian Contract Act and not a "hereditary trading partnership" under Hindu law.

*Held also*, that this partnership was dissolved by the death of plaintiff's husband in 1900 under section 253 (10) of the Act and that this suit, instituted in 1906, which was in substance merely a suit for an account of a dissolved partnership was consequently barred by time under Article 106 of the Indian Limitation Act.

*Held also*, that it was the duty of the Court *suo moto* to see, if upon the allegations in the plaint a suit was in time as a whole or in part, notwithstanding that the defendants pleaded limitation only in regard to part of the claim, and that this rule applied equally to a Court of Appeal.

*Held further*, dissenting from *Merwanji Harmasji v. Rustamji* <sup>(1)</sup> and *Sokkanada v. Sokkanada* <sup>(2)</sup> and following *Rivett Carnac v. Gocul Das* <sup>(3)</sup>, that the suit for a general account being barred by time, it was also barred in respect of specific assets of the business acquired within three years of institution of suit.

<sup>(1)</sup> (1882) *I. L. R.* 6 *Bom.* 628 (635).      <sup>(2)</sup> (1905) *I. L. R.* 28 *Mad.*

<sup>(3)</sup> (1896) *I. L. R.* 20 *Bom.* 15.



And that article 106, Limitation Act, applied to every suit in which plaintiff claimed an account of the general partnership property and his share in the same and its profits.

Held also, that among Khattris, residents in a town and in no way agriculturists, brothers were presumably members of a joint family.

And following *Bala Bux v. Rukhma Bai* <sup>(1)</sup> that where one co-partner separated from the others, there was no presumption that the latter remained united, and, when upon such separation the shares of the other co-partners were fixed, there was a virtual separation of all and an agreement amongst the remaining members of a joint Hindu family to remain united had to be proved like any other fact.

(The meaning of the ruling by their Lordships of the Privy Council in *Partati v. Naunihal Singh* <sup>(2)</sup> explained.)

Held further, following *Bala Baksh v. Rukhma Bai* <sup>(1)</sup> that "a re-union in estate properly so called can only take place between persons who were parties to the original partition."

Held also, following *Balwant Singh v. Ram Kishori* <sup>(3)</sup>, that as regards self-acquired property a Hindu has plenary powers of disposition.

Held also, that where, in a previous suit by the present defendants as plaintiffs for recovery of a book debt the defendants, while admitting the debt, pleaded that it was due to the firm in which the husband of the widow (present plaintiff) had a two-third share and the widow was added as a co-plaintiff under section 32, Civil Procedure Code, 1882, and an issue was framed *inter alia* as to what was her share in the amount claimed, and the Court found that she was entitled to the share which her husband would have had if alive, that this was *resjudicata* between her and her then co-plaintiffs (present defendants), and that it followed that she was equally entitled to a similar share in the rest of the property.

But, that a mere substitution as legal representative of her deceased husband in another suit had not the same effect.

Held further, that this question must be decided under the provisions of the old Civil Procedure Code of 1882, notwithstanding that the new Code of 1908 had come into force before the decision of the appeal in the Chief Court, as it involved a substantive and very real right to which the provisions of section 6 of the General Clauses Act, X of 1897 applied.

But also, that the rule enunciated in *Shamas Din v. Ghulam Kadir* <sup>(4)</sup> was applicable only to ordinary Courts established in this country and was not affected by the question, whether having regard to the value of the two suits, a further appeal might be to the Judicial Committee in the one and not in the other, there being no appeal *as of right* in any case to His Majesty in Council.

<sup>(1)</sup> (1903) I. L. R. 30 Cal. 725 P. C.

<sup>(2)</sup> (1909) I. L. R. 31 All. 412 P. C.

<sup>(3)</sup> (1898) I. L. R. 20 All. 267 P. C.

<sup>(4)</sup> 20 P. R. 1891 F. B.

*Held also*, that section 77 (3) (k) of the Punjab Tenancy Act 1887, did not oust the jurisdiction of the Civil Courts from entertaining the claim for a share in profits of agricultural land which had been realised by the defendants and entered in the books as part and parcel of the assets of the business.

*Fisrt appeal from the Decree of O. Farquhar Lumsden, Esquire,  
District Judge, Ferozpur, dated the 12th April 1907.*

Dawarka Das and Kanshi Ram, for appellants.

Kirkpatrick and Kanshi Ram, for respondents.

The judgment of the Court was delivered by—

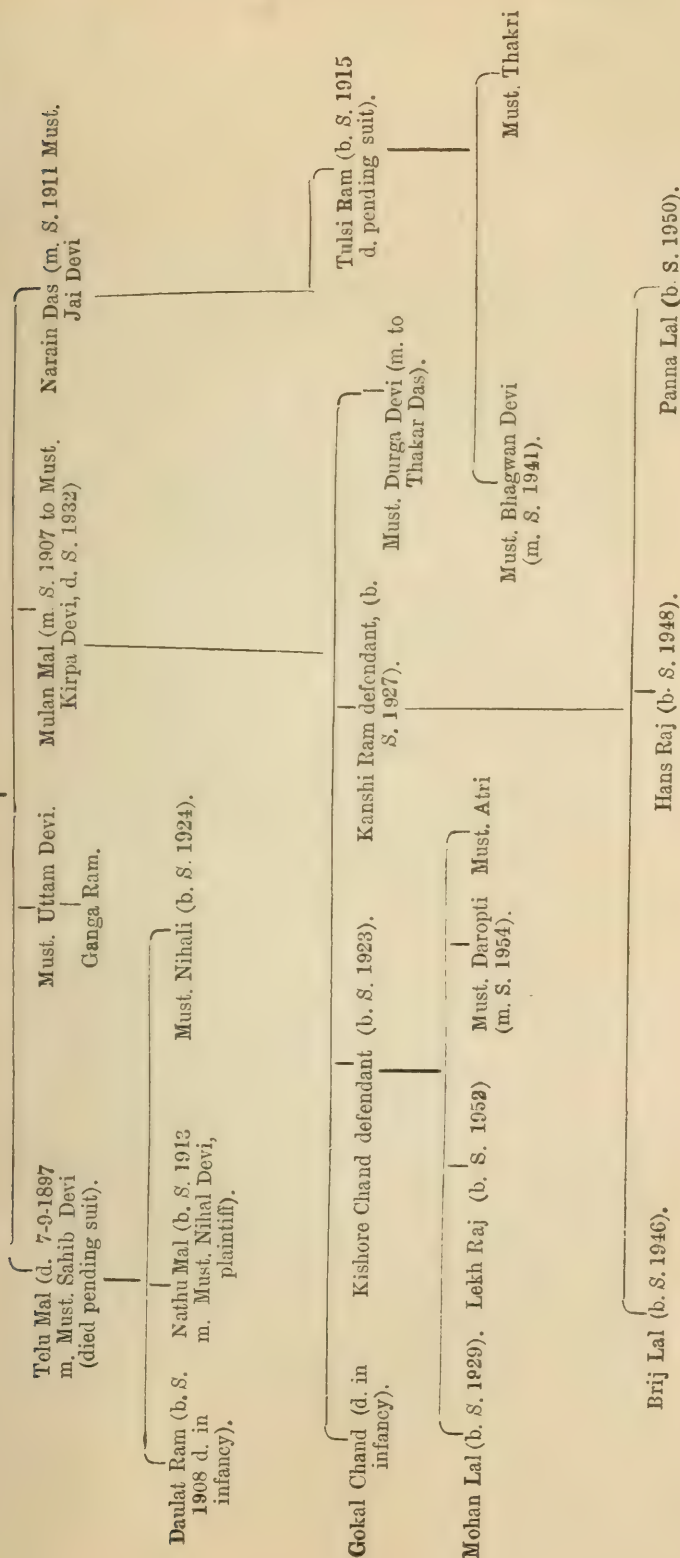
RATTIGAN, J.—After hearing elaborate arguments in this 28th Feby. 1910. case for over five weeks, we have no hesitation in adhering to the opinion, which we arrived at when the appeal first came before us and to which we gave expression on that occasion. This was to the effect that the present dispute should never have been made the subject-matter of litigation between parties who stand so nearly related to each other as do the plaintiff, an aged Hindu widow, and the defendants, who are the first cousins of her deceased husband and admittedly now her own next heirs. We are glad to find that from the very outset both Executive and Judicial authorities have endeavoured to the best of their abilities to dissuade the parties from continuing this most unnecessary and ruinous litigation, but we regret to say that those well meant efforts have proved fruitless. When the appeal first came before us, we ourselves suggested to the learned gentlemen who appeared respectively for the appellant and the respondents, that the dispute was of a nature which ought to be settled amicably by reference, if necessary, to the arbitrament of some mutual and respected friend. Unfortunately this suggestion was not accepted, and the result is what we have been obliged to devote no less than 30 days to the hearing of the appeal. Briefly and baldly stated, the dispute is merely whether the plaintiff, an old lady, is entitled (as she asserts) to claim a definite share in the property in suit, as the heir and representative of her late husband, or whether she is entitled (as the defendants contend) merely to such maintenance as befits a lady of her position. It is admitted that on her death, the defendants will in any event be entitled to the whole of the property, and in the circumstances it seems to us that the position taken up by the parties savours of almost criminal extravagance. Both parties have already incurred

very heavy expenses and this litigation has certainly not tended to make them more friendly disposed towards each other. We shall have hereafter to set out in detail the history and the facts connected with this dispute, but with reference to our present remarks, we may observe that while there was apparently some reason, so long as Tulsi Ram lived, for this conflict between Mussammat Nihal Devi and her husband's other cousins, all occasion for the continuance of that conflict subsided when that person died *pendente lite*. Tulsi Ram was obviously interested in the success of the present suit, and there can be little doubt that it was he who was in reality the plaintiff in the case. But after his death defendants became the lady's sole heirs, and it seems to us that the parties are now wantonly throwing away their money in insisting upon a continuance of this litigation to the bitter end. They have, however, resolutely declined to come to terms and we have, in consequence, been compelled to listen to very lengthy arguments on both sides. In making these remarks we must not be understood to impute anything against counsel on either side. On the contrary, we believe, that they have honestly used their best endeavours to effect a settlement between their respective clients, and if they have failed in their efforts, the blame attaches not to them but to their principals. With these preliminary remarks we proceed to deal with the appeal before us.

The table of relationship given in the judgment of the District Judge, though accurate as far as it goes, is not quite as complete as it might be. The table subjoined supplies a few omissions and is, we are led to understand, both correct and exhaustive.



DITTA MAL m. MUSSAMMAT RAJ DEVI.

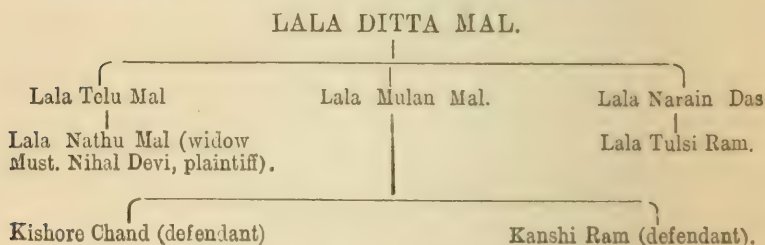


The present plaintiff is Mussammat Nihal Devi, the widow of Nathu Mal, the son of Telu Mal, the eldest of the three sons of Ditta Mal. In the suit as originally framed certain persons who claimed to be alienees of portions of the property in suit were impleaded as co-defendants, but their names were subsequently struck out (with the consent of the plaintiff) and the sole defendants with whom we have now to deal, are Kishore Chand and Kanshi Ram, the sons of Mulan Mal. Before proceeding, we may further note that it is an admitted fact that Tulsi Ram, the son of Telu Mal's other brother Narain Das, was the right-hand man of the plaintiff in this case, and that it was he who was responsible for the drafting of the plaint and the institution of this suit. The plaint runs as follows:—

The cause of action arose at Ferozepore on the 16th May 1900.

The plaintiff begs to state as follows:—

The following pedigree-table discloses the relationship between the plaintiff and defendants Nos. 1 and 2:—



2. Lala Telu Mal, the father of the plaintiff's husband, started at Ferozepore, a firm known as Telu Mal-Nathu Mal, in *Sambat* 1914, corresponding to 1858-A. D. and through that acquired considerable moveable and immoveable property.

3. Lala Telu Mal became a rich man in his city. his brother and poor relations reaped benefit through his kindness, Lala Mulan Mal and Lala Narain Das, his brothers, commenced to live with him. He defrayed the expenses connected with their marriages and gave them whatever he wished.

4. Lala Mulan Mal died in *Sambat* 1932, corresponding to 1876 A. D. Defendants Nos. 1 and 2 are his sons. Lala Narain Das died in March 1900. Lala Tulsi Ram is his son, but he is not a party to this suit.

5. In 1884 Lala Telu Mal divided the entire property owned and occupied by him in the following four shares —

Lala Telu Mal      ...                      ...                      2 shares.

Kishore Chand }  
and Kanshi Ram. } defendants ...                      1 share.

Lala Tulsi Ram, }  
son of Lala } ...                      ...                      1 share.  
Narain Das. }

He caused entries in respect of the villages and culturable land to be made in the revenue papers, in accordance with the above division.

6. Lala Telu Mal kept joint with himself his nephews, Tulsi Ram Kishore Chand and Kanshi Ram up to 1893. In the said year a partition took place among all the co-shares. Under that partition the entire property was divided into four shares mentioned in paragraph 5 of this petition of plaint and Tulsi Ram was given his share of moveable and immoveable property and was separated.

7. Out of the remaining property the houses shown in list marked (A) fell to the lot of Lala Telu Mal, while those shown in list marked (B) fell to the share of Lala Kishore Chand and Kanshi Ram, defendants No. 1 and 2. The said houses become their property separately. The property shown in list marked (C) was set apart by way of charity, and Lala Telu Mal took possession thereof as manager. The remaining property consisting of villages and lands belonging to, and in mortgage with, the firm was partitioned in the following shares:—

Lala Telu Mal                      ...                      2 shares.

Defendants Nos. 1 and 2                      ...                      1 share.

Lala Telu Mal managed the joint and partitioned property jointly with defendants Nos. 1 and 2.

8. The business of the firm was generally carried on in the names of Telu Mal and Nathu Mal. It was sometimes carried on in the names of Kishore Chand and Kanshi Ram. The property acquired in the above names or in the name of any of them was the joint property of all the co-sharers in the firm. Certain property which was acquired in the name of Lala Tulsi Ram and which continued to be entered in his name even after his separation, is the property of the firm.

9. Lala Telu Mal died in September 1897. Lala Nathu Mal, husband of the plaintiff, became owner and occupant of every kind of property left by him. He also became manager of the *Dharm Arth* property. Defendants Nos. 1 and 2, however, managed the whole business and property of every kind.



10. Lala Nathu Mal, the husband of the plaintiff, died on the 23rd April 1900.

11. By law and custom the plaintiff, the widow of Lala Nathu Mal, deceased, is entitled to succeed to the property left by him. She is also entitled to be the manager of the *Dharm Arth* property, shown in list marked (C), during her life-time.

12. After the death of the plaintiff's husband, defendants Nos. 1 and 2 denied the plaintiff's rights. On the 16th May 1909 they made an application to the Revenue authorities praying that the entire villages and lands belonging to the firm might be mutated in their names instead of the plaintiff's name. This is the date on which the cause of action arose.

13. Notwithstanding their denial, the culturable lands, which were shewn in the revenue papers in the name of the plaintiff's husband jointly with the defendants, were mutated in her favour. She was also granted a certificate for realisation of two-thirds of certain debts due to her husband. In many cases her (the plaintiff's) name was entered as the heir of Lala Nathu Mal and decrees for two-thirds share of the debts connected with the joint business of the firm were passed in her favour.

14. In spite of all this the defendants forcibly realize the income of the villages, lands, houses, shops, business of the said firm, *Dharm Arth* property, mentioned in paragraph 7, and also the exclusive property of the plaintiff's husband and refuse to give her any share. They are misappropriating and alienating the joint property. They have unlawfully sold to defendants Nos. 3 to 5, under sale deed, dated the 21st August 1898, the buildings known as *Bawli Ram Dial*, situate at Ferozapore City, which were the exclusive property of the plaintiff's husband.

15. The lands shown in list marked (D) have been mutated by the Revenue authorities in the revenue papers, in favour of the plaintiff. The plaintiff realised a part of the produce of those lands but the defendants forcibly took away the greater portion of the produce thereof. The plaintiff has brought a suit for adjustment of the account of that share of produce in the Revenue Court.

16. In the course of these disputes, the defendants several times sent word through respectable persons promising to give the plaintiff her rights, but she does not now expect that the defendants would give her her rights unless she has recourse to legal proceedings. She, therefore, prays that:--

(a) it may be declared that the plaintiff is representative and heir of Lala Nathu Mal, her husband, and as such is entitled to the entire property left by her husband and also to two-thirds of the entire property acquired with the joint capital of the shop after the death of the plaintiff's husband, no matter in whose name it is acquired. Defendants Nos. 1 and 2 may be ordered to render account of the entire property and the business of the shop mentioned in paragraphs 7 and 8 of the petition of plaint from the date of the starting of the said firm up to 23rd April 1900, and the subsequent period up to the institution of the suit and (the plaintiff) may be awarded two-thirds share of the entire property, viz. cash, valuable securities of every description, shares in firms and companies, decrees passed by Courts and all other movable and immovable property of every kind acquired with the capital of the said firm or belonging to it, together with interest up to the date of realisation, the *lahis* and all other documents are in possession of defendants Nos. 1 and 2 and the plaintiff cannot, therefore, give detail of such property. According to section 7 clause IV of the Court Fees Act she has fixed the value of this relief at Rs. 15,00,000.

(b) The defendant may be ordered to file in Court the *bahis*, account registers relating to the account of property in dispute belonging to the said firm and shown in the list marked (E), she (the plaintiff) may be awarded two-thirds of them, she may be ordered to obtain copies of the rest, the defendant may be ordered to file in Court other papers and documents of every kind relating to the property in dispute, a clue to which may be found from the registers and *lahis* shown in list marked (E) or which are proved in some other way to be in possession of the defendants and she (the plaintiff) may be awarded documents and certificates relating to the property which is awarded to her by the Court or some other order which the Court deems proper for protection of her (plaintiff's) rights and to do justice, may be passed (according to section 7, clause IV, the value of this relief is fixed at Rs. 1,00,000).

(c) She may be awarded possession of the houses shown in list marked (A) and valued at about Rs. 30,000. (The buildings mentioned at No. 8 of the list are in possession of defendants Nos. 3 to 5, as stated in paragraph 14, consequently they have been made defendants.

(d) She may be awarded possession, as manager, of the property entered in list marked (C), valued at about

Rs. 10,200-10-0 an account of the income thereof may be prepared and the amount realized by defendants Nos. 1 and 2 may be awarded.

(e) Any other orders that may be necessary for grant of the above relief may be passed or any other relief to which the plaintiff may be found entitled under the circumstances of the case and according to law and justice may be granted and the defendants may be ordered to pay the costs of this case.

*Dated the 21st April 1906.*

The plaint was duly signed and verified by the plaintiff and bears the signatures of the two legal gentlemen who were then acting for her. Appended to it were the lists referred to therein.

Before proceeding we may here note for convenience of reference, that we have before us three printed paper books, and that in this judgment they will be respectively referred to as follows:—(1) the book which begins with the *jawab-dawa* of defendants, Mahmud Khan and Sultan Khan, as “Book A”; (2) the book which begins with the plaint as “Book B,” and (3) the third book which contains a transliteration of the accounts as “Book C.” Defendants in their written statement admitted paras. 1, 4, 8, 10, 12 (except that the plaintiff had any cause of action in respect of her allegations therein); 13, 15, and 16 (except that defendants did not admit that plaintiff had the rights claimed by her in her plaint). They denied paras 2, 3, 5 (except that Telu Mal had the entries made in Revenue Record; 6 (except that Tulsi Ram received his share and separated from the family), 7, 9, (except that Telu Mal died in September 1897); 11 and 14.

They further pleaded as follows:—

1. A. These defendants’ father, Lala Mul Chand, *alias* Mulan Mal, with Lala Telu Mal and Narain Das, formed a joint Hindu family. About Sambat 1899, they came to Ferozepore and carried on a joint business in the name of Telu Mal-Narain Das.

2. A. In Sambat 1917, Lala Narain Das, under a partition separated, and the business was thereafter carried on in the name of Telu Mal-Nathu Mal, Nathu Mal having been born in Sambat 1913.

3. A. In Sambat 1933, Lala Narain Das and his son, Tulsi Ram, got re-united to the family, then consisting of



Telu Mal, Nathu Mal, Kishore Chand and Kanshi Ram, so far as property was concerned, but continued separate in food and residence.

4. In Sambat 1950, Narain Das and his son Tulsi Ram, again separated from the family and have continued separate ever since. At that time the joint family consisted of Telu Mal, Nathu Mal, Kishore Chand and Kanshi Ram and there has since then, up to the time of Nathu Mal's death, been no separation, division or partition in either property, food or residence.

5. A. Defendant Kishore Chand is now 39 years of age and defendant Kanshi Ram is 34 years of age now, and they were therefore minors at the time of the entry in the Government Records in 1884, under the guardianship of Telu Mal, the managing member of the joint family, their father having died in Sambat 1932.

6. A. The mention of the shares in 1893, was due to the separation of Narain Das and Tulsi Ram at the time. Defendants consented to such record on the understanding that they would be declared sole proprietors of the whole estate on the death of Nathu Mal, as a family arrangement, thus practically excluding the possibility of Telu Mal's adopting a son, Narain Das' share was only a fourth, because at the time he separated the mother of the three brothers was alive and she was given an equal share with her sons. On her death in Sambat 1928, Telu Mal and Mulan Mal, who were joint with her, obtained her share. When Narain Das rejoined in Sambat 1933, his property was only one-fourth compared with the three-fourths of the two other brothers and consequently when he separated in 1893, he received only one-fourth as his share.

7. A. From the partition with and separation from Lala Narain Das and Tulsi Ram, all documents including sale and mortgage deeds and bonds have been executed in the name of these defendants.

8. A. Nathu Mal was born blind and continued blind to the date of his death.

9. A. The plaintiff's suit includes an account of the profits of lands paying revenue to Government from defendants Nos. 1 and 2, as her co-sharers. She has brought a suit for this in the Court of the Revenue Assistant Collector, Ferozepore. This Court has no jurisdiction.

10. A. The plaintiff's suit is barred by limitation except as to any claim for possession of immovable property.

11. A. The plaintiff is not entitled under any circumstances, even if she is entitled to succeed him:—

- (a) To certain accounts prior to her husband's death.
- (b) To challenge the alienations to defendants Nos. 3 to 5.

12. A. The plaintiff has valued her claim for money at such an exorbitant sum that it is submitted she should under section 380, Civil Procedure Code, be required to give security for costs.

Defendants previously to filing these pleas had taken certain preliminary objections to the plaint, but for the purposes of the appeal before us it is only necessary to refer to No. 2 of these objections, which was to the following effect:—

“2. From the plaint it is not clear whether the claim is “founded on the ground of Nathu Mal's having been a partner “with these defendants in the firm or business of Telu Mal- “Nathu Mal to which all the properties claimed formed the “assets, or whether these defendants are alleged to be mere tres- “passers.” In answer to this objection, the learned pleader for the plaintiff made this reply:—“Our claim is based on the “fact that plaintiff is the successor of a deceased co-sharer “or co-partner in the joint properties, as also in the business “firm. I know of no partnership between Nathu Mal and “defendants Nos. 1 and 2”, (*i.e.* Kishore Chand and Kanshi Ram) “under the Contract Act, but if on the facts the Court “were to find that such a partnership existed, this would not “affect the right of plaintiff to the relief claimed.” The plaintiff's pleader traversed the other pleas raised by defendants and in particular asked for further details of the alleged “arrangement” referred to in paragraph 6 A. of the “written statement.” The District Judge agreed that plaintiff was entitled to such further details, whereupon the defendants' advocate made the following statement:—“There was no written agreement. The “parties to the agreement were the members of the joint family “existing at the time—May 1893. The agreement was between “Telu Mal, the defendants' and Nathu Mal.”

Upon these pleadings the District Judge framed the following issues:—

- 1. Was Nathu Mal, at the time of his death, a member of the joint Hindu family?
- 2. If he was, is plaintiff entitled to succeed according to law and custom?

3. Was Nathu Mal blind from his birth?

4. If so, was he not entitled to succeed under law or by custom?

5. Was any arrangement come to in 1893, as alleged by defendants, under which defendants were to succeed to the whole property on the death of Nathu Mal?

6. If the arrangement referred to above be proved, then is the plaintiff notwithstanding its existence entitled to succeed?

7. Is the suit, as regards the movable property, barred by time?

8. Is plaintiff entitled to sue in this Court in respect of the profits of land paying revenue to Government?

9. If plaintiff be found entitled to a share, then is that share not two-thirds of the property, and is there any difference in the share in the case of movable and immovable property?

10. From what date, if any, is plaintiff entitled to demand an account?

11. Was any partition of the property made as alleged in paragraph 7 of the plaint?

12. Was the property detailed in list (C) constituted *waqf*; and if so, is plaintiff entitled to succeed to the management?

13. To what relief, if any, is plaintiff entitled?

At a later stage of the proceeding the plaintiff's pleader raised a further plea that the claim of his client was in point of fact *res-judicata* by reason of certain litigation which had previously taken place and to which the plaintiff and defendants were parties. As the files relating to that litigation were not at the time before the District Judge, no formal issue on this point was raised, but the question was argued before him and as will presently appear, he gave his decision thereon.

The case went to trial upon the above issues, and we have much pleasure in here recording our appreciation of the very careful and painstaking manner in which the District Judge conducted this complicated and difficult case. He has obviously spared no pains in the matter and his long and very complete judgment is in itself sufficient proof of the extraordinary trouble which he took to obtain a complete mastery of the facts and to arrive at right conclusions upon all the questions which he had to determine.

The findings of the District Judge upon the issues were as follows :—



Upon the question whether the present claim was not *res-judicata* he held adversely to plaintiff's contentions, on the grounds that (a) in the previous case of *Kishore Chand Ude Singh*, the only point decided was with regard to the substitution of *Mussammatt Nihal Devi's* name for the purposes of that case, in lieu of the name of her husband who had died *pendente lite*, and the case was not one in which a further appeal lay to His Majesty in Council; and (b) that in the other case, *Kishore Chand* versus *Luchu Mal*, the dispute related merely to a sum of Rs. 5,000 and no further appeal lay to His Majesty in Council, and also because it was doubtful whether it was competent in that case to the co-plaintiff to appeal to the Chief Court from the finding of the Court which decided the suit. The learned Judge disposes of this question in these words:—"On both grounds, therefore, firstly "because "in neither case did an appeal lie to the Privy Council, and secondly because in each case the order passed "was directly based on a decision which in itself could not "operate as *res judicata*, I have no hesitation in finding "against the plaintiff on this plea."

Upon the *first* and *second* issues his findings were that Nathu Mal at the time of his death was a member of a joint Hindu family and that consequently his widow, the present plaintiff, was not entitled to succeed as an heir to his share in the joint family property, the parties being governed, in all matters connected with succession, by the principles of the *Mitakshara* law.

The *third* issue he found in plaintiff's favour and as a result the *fourth* issue also. Defendants have accepted the finding on these two issues and we are not here concerned with them. Upon the *fifth* and *sixth* issues the finding of the learned Judge was that a valid and binding family arrangement had been arrived at in 1893. He was of opinion that Nathu Mal, though not in express terms made a party to this arrangement, was well aware of it and accepted it as enforceable against himself and his representatives.

The *seventh* issue relates to limitation so far as the movable property is concerned. As the learned Judge points out this issue arises only in the event of the Court holding that Nathu Mal was not a member of a joint Hindu family. He has himself held that Nathu Mal was one of a joint family, but he further holds that if his finding on the first point is upset, the claim (*quoad* the movable property) must be held to be barred under Article 106 of the Second Schedule

to the Limitation Act, XV of 1877, inasmuch as upon plaintiff's statements Nathu Mal was a mere partner with defendants and the partnership must be deemed to have terminated when Nathu Mal died, *i.e.*, on the 23rd April 1900, the present suit having been instituted on the 21st April 1906.

Upon the *eighth* issue the District Judge held that the Civil Courts had no jurisdiction to entertain that part of the claim which relates to the profits from the agricultural land, such claim being entertainable by the Revenue Courts alone, (section 77 (K) of Act XVI of 1887). As regards the *ninth* issue, he held that, if plaintiff could establish her case otherwise, she would be entitled to the share claimed by her inasmuch as defendants had in 1893 acquiesced in the distributions of shares as there fixed.

Upon the *tenth* issue, he was of opinion that if plaintiff was entitled to call for an "account", she could claim such account only from the date of Nathu Mal's death.

As regards issue *eleven*, the learned Judge held that it was disposed of by his findings on the first two issues, and with regard to issue *twelve*, he found (1), that the *dharmshala* was not made *waqf* (or *dharmarth*) and (2), that the *shibduara* was in all probability dedicated to religious purposes and that the family had now merely a right of management. But even so, he was of opinion that plaintiff as a female, and even if she succeeded to the rest of the property, would not be regarded by the public as entitled to manage this shrine in the presence of defendants. Upon his finding on the first, second, fifth and sixth issues the District Judge dismissed the plaintiff's claim with costs, and from this decree she has preferred an appeal to this Court. The case as put before us has been argued, as already remarked, with great skill and elaboration by the learned gentlemen who respectively represented the appellant and the respondents.

The main questions upon which arguments have been adduced to us are as follows : —

(1) Whether plaintiff's suit is barred under Article 106 of the Second Schedule to Act XV of 1877 (the Indian Limitation Act).

(2) Whether at the time of his death, Nathu Mal (the husband of plaintiff) was together with defendants, a member of a joint Hindu family as regards the property in dispute.

(3) Whether the right of plaintiff to claim two-thirds of this property is not *res judicata* by reason of certain previous litigation to which plaintiff and defendants were both parties.

(4) Whether the Civil Courts have jurisdiction to entertain that part of the claim which relates to profits from agricultural land; and

(5) Whether plaintiff or defendants is, or are, entitled to the right of controlling and managing such part of the property as is alleged by plaintiff to have been made *wagf* by Telu Mal.

It is obviously necessary to deal first with the plea of limitation, for if her claim as a whole is barred by article 106 of the Limitation Act, *cadunt alia questiones*. In our opinion, the claim is so barred, and we shall presently give our reasons for so holding. But before doing so, we think it only right to explain why, upon this view of the case, we have nevertheless heard arguments upon the merits and in this judgment deal with all the points involved. The value of the property in suit is very large, and the facts are hotly disputed and by no means simple. From the attitude taken up by the parties hitherto, it is obvious that they intend to fight to the death, and we must unfortunately take it for granted that the losing party will not rest content until their Lordships of the Privy Council have been given an opportunity of dealing with the case. In the circumstances and in order to avoid the further delay and expense which would result if our view of the plea of limitation was not accepted by their Lordships, we have decided to hear arguments upon all the points that arise and to give our conclusions thereon. The necessity for a remand to this Court will thus be obviated.

With these preliminary observations we proceed to deal, with the questions before us, *seriatim*.

The first question then is whether the plaintiff's suit is barred under article 106 of the Indian Limitation Act, 1877, which was the Act in force at the time when the suit was instituted? It is not contended that it is barred under any other provisions of that Act, and consequently the question arises whether this is a suit for an account and share of profits of "a dissolved partnership"?

Defendants plead that, upon the allegations in the plaint, there was a partnership between, at first, Telu Mal, Tulsi Ram and defendants; that subsequently Tulsi Ram left the firm or was turned out of it; that thereafter the partnership consisted of Telu Mal and defendants; that on the death of



Telu Mal (in 1897), the partnership was renewed, the new partners being Nathu Mal (who took the place of Telu Mal) and defendants; and, finally, that this partnership terminated (in the absence of any contract to the contrary) when Nathu Mal died in April 1900 (section 253 (10) of the Indian Contract Act, 1872). The present suit was instituted in April 1906<sup>1</sup> that is, more than three years after the date of the dissolution of the partnership by reason of Nathu Mal's death, and defendants urge that it is (as the reliefs claimed show) in substance and in spirit, if not indeed in letter, merely a suit for account of a dissolved partnership and as such time-barred. Defendants, do not of course, admit the correctness of the allegations in the plaint. On the contrary, they deny that there was any partnership between the late Telu Mal (and Nathu Mal) and themselves. They maintain that the family was *quoad* Telu Mal, Nathu Mal and themselves, joint in the strictest sense. But by way of *demurrer*, they plead that upon her own allegations in the plaint, plaintiff must fail as her suit is beyond time, and for this purpose their own allegations in reply are immaterial.

It seems to us that this plea is unanswerable. The plaint has been drafted with great ingenuity and skill. Plaintiff was on the horns of a dilemma. She could not possibly come into Court with an allegation that her late husband was a member of a joint Hindu family with defendants and that the property was jointly owned by that family. Had she done so, her claim must at once have been ruled out, as in that event defendants would be entitled to succeed to the whole property in virtue of the rule of survivorship (*jus accrescendi*). On the other hand, it was impossible for her to admit that the relationship between her husband and defendants, during his lifetime, was merely that of partnership, for had she made any such admission, her claim would obviously be barred under Article 106. The plaint which was drafted with extraordinary care and subtlety, attempts to avoid both '*scylla*' and '*charybdis*,' and as explained by Mr. Dawarka Das, was intended to assert that Telu Mal was the original owner of the whole of the property; that he had subsequently (in 1884) given portions of this property to his nephews, Tulsi Ram, Kishore Chand and Kanshi Ram, who thereupon became co-owners, but not joint owners, with him therein to the extent of the shares specified in the application which Telu Mal presented to the Revenue authorities on the 11th November 1884; that in 1893 Tulsi Ram was

separated off and given his share for himself; and that the other members of the family also partitioned their shares and thereafter held those shares separately. The plaint does not, *totidem verbis*, say so, but it is admitted that the "firm" (or *dukan*) was, after 1893, carried on precisely in the same manner as it had been carried on previously, the only difference being that Tulsī Ram was no longer a member of it. And in par agraph 9 of the plaint it is expressly stated that after the death of Telu Mal defendants "*managed the whole business and property of every kind.*" Furthermore it is obvious from the heading of the plaint (where the claim is summarized) and from the reliefs sought that the whole of the property in dispute was connected with the business of the firm, or *dukan*. The position then taken up by plaintiff may be said to be this—In 1884 Telu Mal gave certain shares in his *dukan* to Tulsī Ram and defendants; in 1893 he got rid of Tulsī Ram, and also "partitioned" the property of the *dukan* between himself and defendants; no actual divisions of the *dukan* was, however, made and its business was carried on as before, at first by Telu Mal and after his death by defendants. Mr. Dawarka Das contends that upon these facts all that can be said is, that Telu Mal gave shares in the *dukan* (which the learned pleader refuses to call partnership) to defendants and made them co-owners with himself to the extent of those shares. He urges most emphatically that by so doing Telu Mal did not constitute defendants either joint tenants with himself or partners in the *dukan*. With the first part of this contention we are not at present concerned, but we may observe *en passant* that it is in flat contradiction with the allegation in paragraph 6 of the plaint, which distinctly asserts that "Lala Telu Mal kept joint with himself, his nephews, Tulsī Ram, Kishore Chand and Kanshi Ram up to 1893," and with the further statement in paragraph 7 of the plaint to the effect that after 1893, "Lala Telu Mal managed the joint and "partitioned property jointly with defendants." But assuming the facts to be as now interpreted by Mr. Dawarka Das, we confess we are unable to see how it can be successfully contended that Telu Mal, by his action in 1884, did not make his nephews partners with him in his *dukan*. This *dukan* was a trading business and by 1884 possessed very valuable property. Telu Mal gives his nephews a share in this business. Admittedly (upon plaintiff's assumptions) each nephew had then the right to withdraw his share from the business, and admittedly none of them did so. On the contrary, they allowed the shares gifted to them to remain in the business, and it is not denied

that they were all entitled to share in the profits of that business to the extent of their respective shares. These being the facts, it is difficult to understand the argument that the relationship subsisting between Telu Mal and his nephews was not that of "partnership" as defined in section 239 of the Indian Contract Act. If the nephews were entitled to withdraw their respective shares from Telu Mal's business, but did not do so, they clearly agreed to combine their property (*i.e.*, those shares) in the business and, as we have said, no one denies that they intended to share in the profits.

Mr. Dawarka Das, seeing this difficulty and being averse at all costs from conceding that in 1884 a partnership was formed between Telu Mal and his nephews, argued that as the parties were Hindus and all members of a family (though not a joint family), the relationship between them that arose from the transaction of 1884 was the creation of a co-ownership, or, at most, of a Hindu Law partnership or trade which differed in all essential particulars from the conception of an ordinary partnership, and, in particular, was distinguishable from the latter, in that it did not terminate on the death of one of the members. The argument might possibly have some force in the case of a hereditary trading "partnership," when members of a *joint family* carry on a trade by themselves or in partnership with strangers and the capital of the firm, or part thereof, is drawn from family property (*see* Mayne's Hindu Law, 7th edition, pp. 384-385). It clearly can have no application to a case where the contention is, that there was no joint family at all; that the property was the sole acquisition of a certain person, and that the other members of the trading partnership acquired their rights therein merely by reason of the owner's generosity. In a case of this kind, the fact that the donor happened to be the paternal uncle of the donee would not, we opine, affect the question, it being conceded that the uncle and the nephew were not members of a joint family and that the property belonging to the uncle was not in any sense joint family property. The cases cited by the appellant's learned pleader in nowise support his case. In *Umardaraz Ali Khan v. Walayat Ali Khan* <sup>(1)</sup> the High Court of Allahabad held that in a suit brought by the other heirs to recover from the widow of a deceased Muhammadan a sum of money said to have been realized by her on account of a mortgage debt due to her late

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(1) (1897) I. L. R. 19 All. 169



husband, the limitation applicable was that prescribed by Article 120 of the Limitation Act. The relevancy of this authority is not apparent. The same remark applies to the decision of their Lordships of the Privy Council in the case of *Ganesh Dutt Thakoor v. Jewach Thakoorain* (1). In that case the plaintiff's claim was, that her husband had in his lifetime separated from his brothers, and her right of action was based on the ground that she was, the representative of her husband and as such entitled to succeed, by right of inheritance, to his property, which was in the hands of his brothers. It is true that part of the property claimed by her, consisted of a share in *Mahajani* business but their Lordships accepted the findings of the High Court that in point of fact there had been an actual partition of all the property (including this business) between the brothers during the lifetime of plaintiff's husband. In the circumstances it was held that plaintiff was entitled to succeed as heir to her late husband in the family property, as it existed at the time of his death or had been subsequently increased by employment of the family funds. This authority would unquestionably have been in point and would have been, of course, decisive in present plaintiff's favour, had the facts here been similar. But they are not. It is true that plaintiff in her plaint, in paragraphs 6 and 7, refers to a partition of the property, but she also states that even after this alleged separation, Telu Mal, during his lifetime, "managed the joint and partitioned property jointly "with defendants" and that after his death, defendants "managed the whole business and property of every kind."

As we shall subsequently show, there was in point of fact no separation at all between Telu Mal and defendants in 1893, but quite apart from this fact, it is clear upon the allegations in the plaint that at first Telu Mal, and, after his death, his son Nathu Mal and defendants continued to carry on the business of the *dukan* jointly, and that this joint business went on up to the time of Nathu Mal's death. In the case before us, therefore, it is impossible to hold upon the allegations in the plaint that plaintiff is suing merely as the heir of her husband for the recovery of property, which had been allotted to him as his separate property by partition. As we have already observed, it is clear from the plaint itself that the whole of the property belonged to the *dukan* (however that word may be construed) and that up to the time when Nathu Mal died,

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(1) (1904) I. L. R. 31 Cal. 262 P. C.

this property, as a whole, was being jointly "managed" by him and his cousins, the latter being in fact the real managers owing to Nathu Mal's admitted infirmities. Upon these facts we must hold that this is not a case of an heir seeking to recover from mere trespassers, property which in reality belonged to his predecessor in title in severalty.

Mr. Dawarka Das' next argument is, that in a case of this kind the ordinary rules relating to a partnership do not apply. We have dealt with this argument above, but we may say a few words here with regard to the authorities cited by him.

The first case is that of *Samal Bhai Nathu Bhai v. Sameshvar Mangal* <sup>(1)</sup>. This was a case in which a Hindu father established a trading firm. The father and his sons lived together as a joint Hindu family and after the father's death, the business was continued under the old name by the eldest brother. The youngest brother was a minor at the time of his father's death. Plaintiff sued the three brothers to recover money due on an account signed by the eldest brother in the name of the firm. It was held that the youngest brother was equally liable on the ground that during his father's lifetime he was a joint owner and after his father's death, he had acquiesced in the continuance of the firm under the same name and ostensibly, therefore, with the same constitution. As a member of a joint Hindu family, he was, therefore, liable for all debts properly incurred by the manager. In the course of their judgment, the learned Judges no doubt remarked, that "the rights and liabilities" of an undivided Hindu family cannot be determined "by exclusive reference to the Indian Contract Act," and it is with reference to these remarks that this case (which is otherwise in no way in point) has apparently been quoted. But the obvious answer to Mr. Dawarka Das' reliance upon this case is that the *dicta*, to which he refers, have clearly no applicability in a case where the parties are (as he contends) in no sense members of a joint family. In *Mul Chand v. Sadhu Singh* <sup>(2)</sup> and *Kapur Chand v. Narinjan Lal* <sup>(3)</sup> the decisions of this Court were also based on the ground that the particular family concerned was joint and undivided, and Mr. Dawarka Das admitted, that he was unable to find any authority in support of his contention that the principle of survivorship, which may appertain in the case of a trading business carried on by members of a joint Hindu

<sup>(1)</sup> (1881) *I. L. R.* 5 *Bom.* 38.

<sup>(2)</sup> 59 *P. R.* 1893.

<sup>(3)</sup> 20 *P. R.* 1897.

family *inter se*, is equally applicable to the case of such a business carried on by Hindus who are not members of a joint family. The passages cited above from Mayne's Hindu Law, (7th edition, pp. 384-385) would appear to be against any such proposition, and *per se* it is contrary to all notions of logic and law.

Learned counsel for appellant further contends that this plea of limitation fails, because neither party asserted the existence of a partnership between Telu Mal and his nephews, and no issue was raised on this point. They urge that if the defendants had raised the question and if an issue had been framed in accordance with such plea, plaintiff would have been able to demonstrate that her claim was within time, even upon the assumption of the existence of an ordinary partnership between the parties. It is true that the actual question, as presented before us, was not raised in the lower Court, though the point was taken in defendants' pleadings that the claim was barred by limitation so far as the moveable property was concerned. But that it was taken at a later stage is clear from the judgment of the District Judge and in the grounds of appeal to this Court, the plaintiff does not allege that this plea came upon her by surprise or that she could, if opportunity had been offered, have disproved the facts upon which the finding of the lower Court was based. In point of fact we are unable to see any force in the argument, that defendant did not plead that the suit framed was for account of a dissolved partnership and as such barred, because the plaintiff had not sued within three years of the date of Nathu Mal's death, when the partnership must (in the absence of evidence to the contrary) be deemed to have terminated. Quite apart from the pleas of the defendants, it was the duty of the Court to see if, upon the allegations in the plaint, the suit was within time, and it is in this light that we must determine this question. Now, in her plaint plaintiff makes certain allegations, and the only inference we can deduce from these allegations is, that there was in law a partnership between Nathu Mal and defendants. Nathu Mal admittedly died more than three years before suit and the present claim is one for a general account, all the property belonging (according to the statements in the plaint) to the *dukan*, Irrespective, therefore, of the defendants' pleadings the claim was *primâ facie* time-barred, and it was the duty of the Court to take up this point, *suo motu*, and in the absence of any explanation on plaintiff's part to show that this *primâ facie* view was incorrect, it should have dismissed the claim



*in limine*. It is idle, therefore, for plaintiff to urge that an issue should have been raised, and that she should have been given an opportunity of establishing facts to disprove the effect of her own allegations. Plaintiff, no doubt, in her plaint does not in set terms assert that her husband was a partner with defendants; but she states certain facts and the only possible inference to be deduced from those facts is, as we think, that such a partnership did exist. In the circumstances it was incumbent upon her to show the ground upon which she claimed exemption from the law of limitation, her claim for a general account having been preferred beyond the period allowed under Article 106 of the Limitation Act, 1877 (*see* section 50, last paragraph of the Civil Procedure Code of 1882).

But this objection apart, it is not easy to see how plaintiff, even if she had been given full opportunity of doing so, could have succeeded in claiming exemption from the ordinary law of limitation. We hold that upon the allegations made by her in her plaint, the relationship that subsisted between her late husband and the defendants was that of ordinary partners. In order to avoid the difficulties of the limitation law, she is perforce compelled to assert that there was no partnership, but obviously her assertion cannot nullify or do away with the facts. We readily admit that it is to the substance, and not to the letter, of the plaint that we must look, in order to see what the claim really amounts to, and it is because we are constrained to find on the facts set forth in the plaint; that a partnership must be inferred, that we are obliged to hold that upon these facts the claim is beyond time. Accepting then these facts for this purpose, we find it difficult to see how plaintiff could have claimed exemption from the ordinary law. Obviously in view of her emphatic assertion that (despite the facts alleged by her) there was no partnership between her husband and defendants, she could not possibly have produced evidence to show that there was a partnership, but that there was either an express or an implied term of the partnership agreement that the relationship between the parties would not terminate on the death of any of the partners. Had there been any such express agreement, we may take it for granted that plaintiff would most certainly have relied upon it in this suit, as it would have secured her everything that she is asking for. Mr. Dawarka Das and his learned junior argue that in any event an *implied* agreement to that effect should be presumed from the fact, that the partnership

did not terminate on the death of Telu Mal. We do not know exactly what occurred on the death of Telu Mal, but even if we assume that on the latter's death, the old partnership was by mutual consent, continued between Nathu Mal and defendants, it by no means follows that there would be an implied agreement that the partnership was to continue when one of the partners died and left no *male representative* to succeed him. In other words, even if there was an implied agreement between the parties, that the son of a partner should succeed to the latter's rights on his death, no implied agreement can, from that fact, be inferred that the partnership was to continue even if a partner died without leaving any male representantive, but only a widow to succeed him. Mr. Kanshi Ram, who replied upon this point to Mr. Kirkpatrick, laid great stress on the fact that neither in this case nor in the previous litigation between the parties, did defendants assert the existence of any partnership between Nathu Mal and defendants. In our opinion, this argument is beside the question. It is quite immaterial for the present purpose that defendants did not put forward the plea of partnership. All that we have to look to, is the allegation in the plaint, and if the only inference from that allegation is that a partnership existed, we must decide whether upon that allegation the plaintiff is entitled to a relief which is consistent with that allegation, but which is *primâ facie* barred by efflux of time. In other suits, not now before us, plaintiff may have proved that she was by inheritance entitled to succeed to her late husband's share in the property. If she has been successful in these cases, she can, of course, execute the decrees in her favour. But with those cases we have no direct concern, so far as regards this preliminary question of limitation. This is a question which stands *in limine*, and if it is decided against plaintiff, all arguments based on decisions in previous cases must necessarily fail.

The next point urged, in connection with this question of limitation, is that defendants in their pleas only contended that the claim to the moveable property was barred, and that it was never asserted in the lower Court that the suit was time-barred as regards the immoveable property. It is quite true that in their pleas defendants urged the limitation question only as regards the moveables, but it is apparent from the judgment of the District Judge that the plea must have been extended later on, so as to cover the whole of the property.

But be this as it may, it is incumbent on us to see whether the claim as a whole or in part is within time. The plaint makes no distinction between the different properties, and in it they are all described as belonging to the *dukan*, except such as were set apart for charity. But even as regards the latter, it is clear from the terms of the plaint, that they were part of the assets of the *dukan*. Mr. Dawarka Das has had to admit that the whole of the properties in suit were acquired by Telu Ram and from the assets of his business. There is thus no distinction to be drawn between the various assets which originally appertained to Telu Ram. Upon the views which we take, the whole of these properties formed the assets of the firm, and if plaintiff's allegations in her plaint are correct, her suit is for account in respect of her late husband's share in all these properties. If, therefore, her claim is barred in respect of the moveable part of the property, it is equally barred as regards the immoveables, *Sudar Sunam Maistri v. Narasimhulu-Maistri* (1). The whole of the property belonged to the *dukan* (see Kishore Chand, p. 35 "A." l. 25, whose statement stands uncontradicted and is in accordance with the brief statement of the claim in the heading to the plaint), and neither in the plaint or the pleadings or the evidence is there any support for the contention, raised for the first time before us, that portions of the assets of the "partnership" were, by the agreement of the parties, withdrawn from the partnership (or *dukan*) and converted into land or houses to be owned by the parties not as partners or joint owners but as co-owners. Mr. Dawarka Das admittedly was unable to point to any evidence in support of this theory, but he asked us to remand the case, if necessary, in order to enable his client to supply the deficiency. We could not see our way to acceding to this request. The case has already been very protracted and the parties have had the fullest opportunity of adducing evidence in support of their respective contentions. It is too late now to ask us to allow plaintiff further to delay the decision of her claim and to add to the already very heavy expenses to which both parties have been put, by remanding the case for inquiry upon a point which was not raised in the Lower Court, which is inconsistent with the allegations in the plaint, and which is not supported by an *iota* of the evidence already on the file.

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(1) (1902) I. L. R. 25 Mad. 149



Mr. Dawarka Das' next contention is, that even if the claim for a general account is barred, the suit is still within time in respect of any assets of the *dukan* that may have been acquired within three years of the institution of the suit. For this proposition reliance is placed upon *Merwanji Hurmasji v. Rustamji* <sup>(1)</sup> and *Sokkanadha v. Sokkanadha* <sup>(2)</sup>. With every possible deference, we find ourselves unable to agree with these authorities, and we prefer the views expressed by Candy, J. in *Rivett Carnac v. Gocul Das* <sup>(3)</sup>. It is difficult to see how the representative of a deceased partner can sue the surviving partner for any particular asset belonging to the late partnership, unless he sues for a general account, and in the Madras case this difficulty is realized, the learned Judges conceding that "of course to allow such a claim" (*i.e.*, for recovery of a particular asset) "to be maintained without the defendant being at liberty to go into the whole accounts and, if possible, defeat the plaintiff's claim by showing that the net balance is against the plaintiff, would be unjust." But why should defendant be forced, by indirect means, to go into a general account where, owing to plaintiff's own default, it is no longer open to the latter to claim directly the taking of such accounts? Furthermore, when is this process to end? Is the plaintiff to be at liberty to sue on every occasion when an outstanding debt is paid, no matter how many years may have elapsed since the dissolution of the partnership?

But apart from these objections, we cannot see how plaintiff can possibly claim recovery of any such alleged assets, as from the plaint it is clear that every particle of the property, of which she claims a two-thirds share, either formed part of the assets of the *dukan* and was in the possession of the shareholders, or partners, at the time of Nathu Mal's decease, or was subsequently acquired from the funds of the *dukan* as they existed at that time. In paragraph 12 it is distinctly stated that the cause of action—and it is to be noted, that *only one cause of action* is referred to—arose on the 16th May 1900 when defendants denied the right of plaintiff to her late husband's share, and there is no suggestion that there were any subsequent causes of action that accrued from time to time as various outstandings were realized by defendants. It is hardly necessary to refer to Mr. Dawarka Das' final argument upon this question, *viz.*, that Article 106 of the Indian Limitation

<sup>(1)</sup> (1882) *I. L. R.* 6 Bom. 628 (635).

<sup>(2)</sup> (1905) *I. L. R.* 28 Mad. 344.

<sup>(3)</sup> (1896) *I. L. R.* 20 Bom. 51 (27-35).

Act, 1877, applies merely to a claim for a share of the *profits* of a dissolved partnership and not to a claim for a share in the *capital*. We did not understand this contention to be seriously pressed. It is, of course, futile, as the words of the article are "for an account and share of the profits of a dissolved partnership;" in other words, the article applies to every suit in which the plaintiff claims an account of the general partnership property and his share in the same, and its profits. A late partner cannot claim specific portions of partnership property; he must, in the first instance, sue for an account, and it is only when the accounts have been gone into and settled, that the shares of the late partners can be distributed between them. In other words, "as long as the accounts remain unadjusted, no suit by a partner in respect of any matter involved in the general account will lie, and, except by a suit for an account, he cannot recover his share of the profits or of the assets" (Cunningham and Shepherd's Indian Contract Act, 10th edition, p. 538).

For the reasons given, then, we hold that the present suit is barred under Article 106 of the Indian Limitation Act, and must, therefore, be dismissed. But, as explained above, we think it advisable to discuss the other points that were argued before us and to give our *finding upon* them.

The next question then is, whether Nathu Mal, the late husband of plaintiff, was at the time of his death, joint with defendants in family relationships, or in property, or in both, or in neither. For the purpose of determining whether the suit was barred by limitation, we assumed that the plaintiff's allegations in her plaint were correct, and we deduced from those allegations the conclusion that Nathu Mal and defendants were partners up to the date of the former's death. But this was in connection merely with the limitation question, and if it be held that there was in fact no partnership of the ordinary kind between these persons, the question then arises, whether they were members of a joint Hindu family, and as such enjoying jointly the property of the family. Defendants contend that their father, Mulan Mal, and his two brothers, Telu Mal and Narain Das, formed from the very outset a joint Hindu family in every sense of the term; that Narain Das separated from the family about 1860 (*Sambat* 1917) and was given his share of the property; that Telu Mal and Mulan Mal continued joint, and so did their respective sons (Nathu Mal and defendants); that there was an attempt made in 1876 to re-unite Narain Das' son, Tulsi Ram, but that in 1893 the latter

was given a share in the property and entirely separated off; that the whole of the property in suit belonged to the joint family as represented by Nathu Mal and defendants; and that on the death of Nathu Mal, the latter were entitled to succeed, by right of survivorship, to the whole property, plaintiff, as the deceased's widow, being entitled merely to fit and proper maintenance.

It is now conceded by plaintiff that if Nathu Mal and defendants were members of a joint family and held the property jointly, she has no right to a share in it. Defendants' allegations are, however, hotly contested and the counter-allegation,—that it was Telu Mal who alone and without any material assistance from any family property acquired the Ferozepore *dukan* and all its valuable assets—has been put forward and argued with great dialectic skill and subtle ingenuity by plaintiff's learned pleader. It remains for us now to decide which of the two allegations is borne out by the evidence on the record. The District Judge has, in his judgment, discussed this difficult question very lucidly and in great detail, and after careful consideration of all the facts and arguments, has arrived at the conclusion that the family was joint originally, and that Telu Mal, Mulan Mal, Nathu Mal and defendants were, when alive, members of that joint family and held the property (which had been acquired mainly through the extraordinary abilities of Telu Mal, but yet in the first instance from ancestral funds) as members of such family. The reasons which led the learned Judge to these conclusions will be found briefly, but clearly summarised at page 157 of book "A."

At the hearing before us Mr. Dawarka Das and Mr. Kirkpatrick left no stone unturned in their efforts to show, the former that the District Judge's finding on this issue was erroneous, the latter that it was correct. Learned counsel took us through a mass of evidence, oral and documentary, in support of their respective arguments, and it may be possible that in this judgment we have, owing to this deluge of detail, overlooked some small point or other. We believe, however, that we are now thoroughly conversant with all the important facts and we have endeavoured to do full justice to every argument addressed to us and to neglect no fact or point of any material value. As a result of our labours, we have arrived at the same conclusions as the District Judge, whose finding upon this issue is, in our opinion, entirely justified by the evidence and by the probabilities of the case.



The parties are of the Khatri caste, residents in a town, in no sense agriculturists, as such, the three brothers, Telu Mal, Malan Mal and Narain Das, would, presumably, be members of a joint Hindu family. In addition to the above-mentioned facts, we have it established that the brothers had an ancestral home in the small town of Bilaulpur, in the Ludhiana District, and that in that town there was a house and some other property belonging to the family. It would seem that this Bilaulpur property has never been divided off between the three branches,—probably because of its small comparative value—and is still joint. Tulsi Ram (whose evidence on all such questions is particularly valuable, not only because he is to all intents and purposes the real plaintiff in the case, but also because at the date of the trial he was the only male surviving member of the family, who could speak from actual knowledge of the facts) admits that he had heard that the family came originally from Bilaulpur, and adds, “we used to live in Bilaulpur in our *ancestral house*. It is still in existence. I know there is a *house and some shops*. I do not know how many of the *latter*.” It is true that he adds that he does not know whether that property is still joint, but as no one has ever suggested that that was divided, we may fairly assume that it retains its original character, especially as the defendant, Kishore Chand, had already sworn that it was still joint (p. 26 “A”). Tulsi Ram, with this positive assertion before him, was not prepared to deny the fact. In the circumstances it may, we think, be taken as proved that the three brothers were members of a joint family, and that this family had a nucleus of ancestral property in Bilaulpur consisting of a house and certain shops, which even to this day are the joint property of the family. In further corroboration of this fact we have the evidence of Sri Dhar (P. W. 13), the plaintiff’s *mujhtar*, who states that his own family comes from Bilaulpur, and that “Telu Mal’s ancestors used to live in the same *muhalla* as my ancestors.” We do not understand that it is now denied that the family was originally joint and resided at Bilaulpur. But if further evidence on this point is needed, we would only point out that Telu Mal in the year 1850 describes himself as a resident of the place (Exhibit D. X.) and that Narain Das was admittedly married then (*see* evidence of Mussammat Sahib Devi, P. W. 91, p. 107 “A”, l. 21).

We start, then, with this established fact that this Khatri family used to live as an ordinary joint Hindu family in an ancestral house at Bilaulpur, and that there was in addition to

the ancestral house, certain other property belonging to the family in that place. As to the nature and value of this other property, we are rather in the dark. Kishore Chand and Tulsi Ram both refer to it as consisting of certain shops, but there can be little doubt that whatever it was, it was of no great value. Defendants produced certain documents (Exhibits D. IV B.; D. IV D. D. IV. A. ; D. IV C. and D, IV. E.) which purport to be leases, of certain shops in Bilaulpur executed by Telu Mal and other members of the family. None of these leases have been proved in the ordinary way, and the District Judge quite rightly held that all except D. IV. B. were inadmissible in evidence. As to Exhibit D. IV. B. he held that it could be admitted, inasmuch as it was a document more than 30 years old and had been produced from the custody of the persons in whose possession it would naturally be (section 90 of the Indian Evidence Act). Mr. Dawarka Das argued at some length upon his point, and we confess there was considerable force in his contention that the Court should not, in the absence of any proof, accept a document as undoubtedly genuine and beyond reproach, simply because of its alleged age. We need not, however, enter into a discussion of this question, as we are fully satisfied *aliunde* that the family was originally joint, had joint property at Bilaulpur, and for aught we know, to the contrary, remained joint *qua* that property up to the date of suit.

The next stage in the case is the move to Ferozepore and the starting of business there. Plaintiff's case is that Telu Mal alone set up this business, and that he started (as Dick Whittington of old) without any capital, but, by his singular abilities, gradually built up the highly successful firm of Telu Mal-Nathu Mal. That Telu Mal was the genius of the family, and that it was due to his wonderful business capacity that the Ferozepore shop rose to its present position, is abundantly proved by the facts on the record. But defendants, while in no-wise controverting these facts, are fully justified in asserting that there is no evidence whatever in support of the assertion in the plaint that Telu Mal alone went to Ferozepore in the first instance, and that he arrived there without an anna in his pockets drawn from the ancestral funds. On the contrary, there is evidence on the record to show that from a very early date one or other of his brothers was working with him at Ferozepore and that at times the shop at Ferozepore was worked by all three. Before referring to this evidence, we may here observe, *en pas-*

sant, that Tulsi Ram admitted that the statements in paragraphs 2 and 3 of the plaint, which relates to the starting of the Ferozepore shop and which were made upon his authority, are incorrect, and that he had no knowledge as to when Telu Mal, Narain Das or Mulan Mal first arrived at Ferozepore. We do not lay any great stress on this admission as a point in favour of defendants' story. We refer to it merely for the purpose of shewing that the allegations in the plaint are, *prima facie*, open to doubt upon this point. And against these assertions in the plaint we have the statements made by Tulsi Ram on the 4th July 1900 before the Revenue authorities to the effect that the Ferozepore business was built up by Telu Mal, Mulan Mal and Narain Das jointly (*vide* mutation proceedings after the death of Nathu Mal, not printed). To a similar effect was the statement made by Nathu Mal, plaintiff's deceased husband, in the case of Kishore Chand, etc., *versus* Lehua Singh in the Court of Pandit Harkishen Das, *Munsif*. In that case the deceased swore that during the lifetime of Lala Telu Mal, Lala Telu Mal and myself were proprietors. Kanshi Ram and Kishore Chand also have had a share init from the very first (book "B", p. 115).

As we shall now have to make frequent references to the account books produced by defendants in this case, we may, before proceeding, dispose of the objection that certain of these books are not genuine. It is admitted that no exception can be taken to the books which date from *Sambat* 1914 onwards, but a violent attack was made in the Court below and also in this Court upon the books of prior date. It is quite true that these latter were produced at a late stage in the case, but this fact has been explained by defendant Kishore Chand. The District Judge has accepted the explanation as satisfactory and we see no reason to differ. In a large business establishment, such as that of the Telu Mal-Nathu Mal concern, it is matter for no surprise that old account books, relating to events which occurred 50 or 60 years ago, should be lost sight of. Indeed, most of such books would in the ordinary course of things, be destroyed, though it is, at the same time quite natural that some of them escape destruction owing to the fact that they were stowed away in odd corners. But that the books produced before us are, as a whole, perfectly genuine, is we consider fully established. In the first place there are entries in the *tombu bahis* of 1905—1907 (and these are the books most strenuously attacked) which Tulsi Ram admits to be in the hand-writing of Telu Mal himself (*see* book "A", p. 49, ll. 19-42). In the next place, we find the books of the firm



Naurang Rai-Bishen Dial, corroborating the books of the Telu Mal shop in certain matters, which relate to the year *Sambat* 1910—(see book "A", p. 97 and of book "C", p. 539, in both accounts there is a balance of Rs. 419-1-3). We cannot believe that the defendants have not only fabricated books belonging to Telu Mal-Nathu Mal, but have also further fabricated books of a third party. In addition to this we may add that we can see nothing in the appearance of the books themselves to raise suspicion as to their genuineness as a whole. We pointed this out to Mr. Dawarka Das, but at the same time we told him that it would still be open to him to show if he could, that particular entries were open to suspicion. And here we may remark that with one possible exception, he has not been able to satisfy us that the books are not in every respect trustworthy. We do not say that even as regards the one entry in question, we feel justified in accusing the defendants of fabrication. With this entry we shall deal later on, and we need here say no more than that while it is in some respects a curious one, we are far from stamping it as false. We hold then, that the account books produced by defendants (which, we may note, are continuous and carry on the accounts from year to year) are genuine, and that we can rely upon them. With these preliminary remarks we proceed to deal with the general question. There is, to our minds, convincing evidence that the shop at Ferozepore did not belong exclusively to Telu Mal. As already shown, there is nothing to support the plaintiff's allegation that this shop was started by Telu Mal independently of assistance from his brothers or from the joint ancestral funds. No one is able to say with any approach to definiteness when this shop started, but from the *tombu buhis*, which the defendants have produced, it is clear that it was doing business in the *Sambat* year 1905 and onwards, and from the entries then made it would appear that the shop was known as Telu Mal-Narain Das. The first entry we have in the *tombu buhi* of *Sambat* 1905 relates to the receipt of money for the sale of a house to Telu Mal-Narain Das and Tolsi Ram (p. 49 "A", l. 19) admits that this entry is in the handwriting of Telu Mal. Then in *Sambat* 1907 we have the receipt (Exhibit D. 2) executed by Rura and Kura in favour of Telu Mal-Narain Das and Mulan Mal ("B", p. 176). This is the document to which we have referred above as being, in some respects open to a certain amount of suspicion. *Per se* it does seem to be a curious document and its recitals are

undoubtedly extraordinary. But it must be remembered that accounts in those days were kept rather differently, and in favour of the genuineness of this entry, we have the fact that there is a corresponding entry in the *rokar bahi* of the years 1907-1909, which will be found at p. 734 of book "C." Upon the whole, we agree with the District Judge that this receipt is genuine, and that it shows very clearly that so early as in the *Sambat* year 1907, the three brothers were jointly interested in the Ferozepore business. That the firm at Ferozepore was doing business so early as *Sambat* 1910 in the name of Telu Mal-Narain Das is further borne out by the books of the firm Naurang Rai-Bishan Dial. The books of the latter firm were produced by the witness Dharm Sukh, and from these books it is shewn that there was a *Khata* in the names of Telu Mal-Narain Das (with *Khata bahi*) from the *Sambat* years 1910-1914-(see "A." p. 97).

Then in *Sambat* 1911 we have a balance in the *rokar bahi* in the name of Telu Mal-Narain Das ("C" p. 2) and in the "ganesh" (or dedication) of the *roznamcha* of *Sambat* 1911-1916 the shop is described as that of "Telu Mal-Narain Das."

In January 1855 a certain house was purchased from one Gursa Singh and there is on the back of the sale-deed in favour of the latter an endorsement to the effect that the property had been transferred for value received to Telu Mal-Narain Das," ("B." p. 178). This deed and its endorsement are valuable for two purposes. In the first place they show that property in Ferozepore was so long ago as in 1854 bought in the names of Telu Mal and his brother, and in the second place they serve to discount the value of the earlier deed of the 17th March 1850 ("B" p. 175) as evidence in favour of Telu Mal being the sole owner of the Ferozepore property. In 1850 Telu Mal is said to have purchased in his own name a certain piece of property from one Mussammat Diyan. It will be seen that this property was at the time bounded on the west by property belonging to Kalandar Bakhsh and on the south by certain shops belonging to Telu Mal. In all probability the property purchased by Telu Mal-Narain Das from Gursa Singh (who bought in turn from Kalandar Bakhsh) was the *sarai* which in 1850 was described as being the western boundary of the property then purchased by Telu Mal from Mussammat Diyan. We now come to certain documentary evidence which in our opinion, tells strongly, if not indeed conclusively in favour of defendants' contention.

Exhibit D. XII ("B" p. 185) is a registered deed of sale relating to a house and dated the 12th November 1855, executed by Fakir Sayad Shab Nawaz-ud-Din in favour of Telu Mal-Narain Das and Mulan Mal. This house was bought for the purposes of a residence for all members of the family and it is not denied that Telu Mal and the other members of the family, including Mulan Mal, his wife and his children and also Nathu Mal and his wife used to live in it. The amount expended on the purchase of this *haveli* was duly entered in the *Kharch Khata* of the shop, (see "C" p. 383). A large sum, about Rs. 6,000 was subsequently expended in enlarging and repairing this *haveli* and this amount was also entered in that *Khata* ("C" p. 387). It has been asserted by counsel for respondents and not denied by counsel for appellants, that when Mulan Mal retired from the Bilaulpur business in *Sambat* 1923, he and his branch lived in this *haveli* with Telu Mal-Nathu Mal and the other members of the family, including the old mother who ended her days in Ferozepore. Next we have Exhibit D ii A (p. 188 "B. "). This deed, which is dated the 4th August 1856, relates to the purchase of certain land in *Mauza* Bhagel Singh Wala. It will be noticed that the deed of sale is in favour of Telu Mal alone, and from its terms one would infer that he was the sole purchaser of the land. As we have already had occasion to remark, Telu Mal was the *genius* of the family and it was unquestionably due to his wonderful natural abilities that the family succeeded as they did. At times he would seem to have presumed on this fact, but the other members, especially Mulan Mal, would on the other hand appear to have kept a jealous eye on his actions. In the present case, after securing a deed of sale in his own name he was subsequently compelled to admit, that in this purchase he and his two brothers were equally interested and had equal shares. According to the endorsement made on the back of this deed ("B" p. 189), Telu Mal concedes that "we all three brothers have equal shares in this village. The consideration for the deed, regarding the village, was paid out of the fund relating to the shop. Telu Mal has no exclusive right. As Narain Das could not go to court, the deed was drawn in my favour. The village has been purchased with the shop income. This village certainly belongs to Mulan Mal and Narain Das also." Mulan Mal at this time was doing business at Bilaulpur and hence the reference only to the inability of Narain Das to attend to the execution, etc., of the deed. This village was purchased for a sum of Rs. 340,



and that item will be found duly debited to the *Kharch Khata* at page 384-5 of "C."

This document, with its endorsement, is obviously a strong piece of evidence in favour of defendants' contention. It is not, and clearly could not be, contended that the endorsement was a forgery, and the only explanation which plaintiff's counsel has to offer is that the endorsement was made by Telu Mal at a later stage. This was one of the documents of which *Lala Jugal Kishore*, Sub Judge, took possession on the 2nd June 1900, and at that time it certainly came to the knowledge of *Tulsi Ram*. There is no suggestion, therefore, that it has been fabricated for the purposes of the present case. But the argument for plaintiff is that Telu Mal for his own purposes made the endorsement at some later stage in the proceedings than 1856. We confess we are at a loss to follow this argument. Telu Mal in after years certainly did his best to make out that he alone was the founder of this business, and in many ways he was right in so asserting. In point of fact, in 1889 he actually informed the Revenue authorities that it was he alone who purchased this *Baghel Singh Wala* village, (p. 108 "A" l. 1-4). It is hardly likely, therefore, that he would have made this endorsement on the deed at a time when he was contrary to its terms, asserting that he was the sole purchaser of the village. With these subsequent assertions of Telu Mal we shall have to deal presently, and in the present connection we need say no more than that the endorsement which presumably was made at or about the time of the purchase, shows very plainly that the village was purchased out of the funds of the "shop" and that this shop was recognised as belonging to the then joint family of Telu Mal, *Mulan Mal* and *Narain Das*.

The facts above stated are good evidence that the shop in question was a joint concern. *Mulan Mal*, as we know, was during most of this time managing a shop at the ancestral home and we shall presently have to deal with the question whether that shop was a mere branch of the *Ferozepore* concern or an independent business. But *Narain Das* was at *Ferozepore* and admittedly engaged in the *Ferozepore* shop. Plaintiff's contention is, that he was a mere employé and not a partner in the shop. This contention is in our opinion, proved to be erroneous from what we have already stated. It is, to our minds, clearly established that from a very early date the *Ferozepore* shop bore the name of *Telu Mal-Narain Das*, and we cannot believe that this would have

been the case had Narain Das been a servant or even a mere manager of the concern. There is a vast amount of evidence to the contrary, apart from the facts already referred to. For instance, Tulsi Ram admits ("A" p. 491. 9) that as far as he can gather from the books, the name of "Narain Das-Telu Mal" dates from *Phagan Sudi 11, Sambat 1911*, and this was "the original name of the firm." He further admits (p. 92 "A" "1. 22), "Between 1914-1917 my father, Narain Das was "joint, I believe \* \* \* \* I have no doubts in the matter "after seeing the books."

Then we have the fact that Narain Das had a joint *khata* with the infant son of Telu Mal, Daulat Rai, (p. 57 "A" 1. 23).

Again, it is abundantly clear from the correspondence that passed between Telu Mal and Mulan Mal that Narain Das was intimately connected with the former in all business and family transactions (see especially pp. 33, 35 and 64 of "B"). Furthermore, we have the bond executed in favour of Telu Mal-Narain Das by one Chuhar Mal, *Bhabra*, on *Magh Sudi, Sambat 1907*, to which a reference will be found at page 696 of "C." In addition to all this, we have the entries in the *bahis* produced by the witness Dharm Sukh (p. 97 "A") and the evidence of plaintiff's own witness, Dula Mal (p. 110 "A") who states that when he first knew the shop, it was known as "Telu Mal-Narain Das." He is an old man of about 70 years of age and presumably not unfavourably disposed towards the plaintiffs.

In view of all these facts we have no doubt that the shop at Ferozepore up to *Sambat 1917* was the joint property of the three brothers. That there are arguments to the contrary we fully admit and with these arguments we shall deal presently, but we may at once anticipate matters, by saying that after giving every weight to them, we see no reason to doubt the correctness of the District Judge's finding to the effect that up to the date when Narain Das was separated off (*i.e.* in *Sambat 1917*) the family was joint in every sense of the term. Telu Mal was not only a strong man and a man of great business aptitude, he was also a man who appears to have been devoted to his family and ready at any cost to keep that family compact. But unfortunately for him, his younger brother, Narain Das, was (to use his own words) "a fool." From the correspondence on the record it is quite clear, that despite all his endeavours Telu Mal found it impossible to carry on business with Narain Das. In

his letters to Mulan Mal, he very pathetically remarks, "Narain Das is now-a-days doing no work. He keeps sitting idle. We are not in a position to ask him to do any business. We are undergoing troubles on account of Narain Das. \* \* \* \* Narain Das is dealing with us so harshly as if he has got a spade in his hands and is doing just as a river does in washing away lands. It appears to us that he would make us beggars. Let God's will prevail. We are powerless." This letter was written in *Sambat* 1915 and it is common ground that sometime prior to this Telu Mal had allowed Narain Das to set up a shop of his own (known as Ditta Mal-Narain Das) in Ferozepore. This letter makes it clear that Narain Das had not been giving satisfaction to Telu Mal, and it is admitted that in *Sambat* 1917 matters came to a crisis and that Narain Das from that date severed his connection with the shop of Telu Mal. The question, however, is whether when Narain Das left the shop, he left it merely as a dismissed employé or as a member of the joint family, receiving before his departure his full share in the joint family, property. Plaintiff's allegation is that he was more or less summarily dismissed, but, that as he happened to be a brother of the owner of the shop, he received a "bonus." Obviously the terms of the letter to which we have referred would not appear to countenance this view, for if Narain Das was merely a servant, (though also a brother), it is strange to find Telu Mal deploring the fact that he can do nothing to counteract the evil effects of Narain Das' idleness. But the final and conclusive answer to the argument is to be found in the entry made by Telu Mal when Narain Das was eventually separated off. This entry will be found at page 57 of book "C." It seems to us impossible to argue in face of this entry read with the entry at page 58 of book "C." that Telu Mal was ridding himself merely of an employé who had proved of no use to him. If this was the state of affairs, what necessity was there to provide that Narain Das should in future have no right to the other property of the "shop." And even more important, why should Telu Mal in the subsequent entry (at page 58 "C.") have been careful to state that the three remaining shares in the property would be kept by him in trust for (1) himself, (2) the mother; and (3) Mulan Mal, his brother. In our opinion, these two entries, read with the other evidence in the case render it clearly and conclusively proved that the family was originally joint in all respects and that after the separation of Narain Das, the other members remained joint and undivided. As an answer to all this Mr. Dwarka Das contends that Narain



Das could not have been a member of a joint family inasmuch as if he had been such, his share in the property would have exceeded Rs. 10,000 in value, and he has referred us to certain passages in the evidence of Tulsi Ram and of Kishore Chand which tend to show that Rs. 10,000 did not in reality represent anything like one-fourth of the value of the property in *Sambat* 1917. Tulsi Ram has given it as his opinion that this property was at that time worth between Rs. 70,000 and 80,000, and it is quite obvious that the *khata* upon the basis of which the partition of *Sambat* 1917 was made, did not include valuable assets of the "firm," or the principal monies of which the firm was possessed. The evidence of Kishore Chand (p. 55 l. 21 of Bk. "A.") is clear upon this point and so too is the *khata* itself (pages 24, 25 of Book "C.") It may therefore be conceded that in actual fact Narain Das did not receive a full fourth part of the assets of the firm as they existed in *Sambat* 1917. But conceding this, we are still unable to hold that Narain Das was not a member of the joint family or that the property was not, in the strict sense of Hindu Law, joint property. It must be remembered that the shop at Ferozepore began in a very humble way and that its prosperity was due mainly, if not indeed entirely, to Telu Mal. Narain Das had for some years prior to *Sambat* 1917 proved himself an indifferent man of business, wasting his time and the money of the shop, and he had been pestering Telu Mal to separate him off and allow him to conduct an independent business of his own. Telu Mal was clearly averse to this, but was finally obliged to comply with Narain Das' wishes. Now Telu Mal had no high opinion of his younger brother—in fact, in one of the letters to Mulan Mal, he describes him as "a fool", and we think it quite probable that when Telu Mal was ultimately forced into separating from Narain Das, he was determined not to give the latter more than he could help. Narain Das was anxious to set up an independent business and would in all probability be ready to accept any reasonable terms from the masterful elder brother. He had paid no great attention to business matters and had (as Telu Mal complains) been wasting his time in idleness. In the circumstances it is scarcely a matter for surprise that Narain Das cheerfully accepted Telu Mal's terms, and that he did not attempt to scrutinise the accounts carefully. According to the entry at p. 57 of Bk. "C." he was given a fourth share in the assets of the whole shop, and the fact remains that he accepted

what he got as really amounting to such fourth share. It is no answer to this now to say that Narain Das did not in point of fact get his true fourth share. That may be so, but whether because he was a fool or because he was over anxious to start his own business quite independently and therefore did not think fit to quarrel over the division of the property, he certainly accepted the situation and took what was given to him as his real share. In our opinion, the facts to which we have referred above make it abundantly clear that Narain Das was jointly interested in the property from the very beginning of the history in this case and that he was not merely an employé in the shop of his brother Telu Mal. Nor are we shaken in this opinion by the fact that in *Sambat* 1917, when he was separated off, he did not perhaps receive the full amount to which he was entitled, the latter fact being explainable on the grounds which we have set forth.

We take it, therefore, that Narain Das was joint with Telu Mal in property up to *Sambat* 1917 and that in that year he became separate. There is abundant evidence on the record to show that up to that year the other brother, Mulan Mal, was also joint with Telu Mal. In the first place there is the documentary evidence to which we have already referred (*viz*, Rura's receipt, "B." p. 176); the endorsement on exhibit D ii A; ("B.", p. 159); exhibit D. XII ("B" p. 185). Then again the whole tenour of the correspondence between Telu Mal and Mulan Mal shows that both brothers were keenly interested in each other's affairs as carried on at their respective shops (see especially p. 33 of Bk. "B"). Mulan Mal, again, was married before *Sambat* 1917 and his marriage (which took place at Ferozepore) cost a very large sum of money (Rs. 4,344-3-3) and this sum was duly debited to the *Kharach Khata* of Telu Mal-Nathu Mal. Even so far back as *Sambat* 1909 we find a sum of Rs. 25 odd advanced to Mulan Mal being debited to the *vatta Khata*, ("C" p. 382). Furthermore, Tulsi Ram in his evidence admits that from certain entries in the *rokars* of *Sambats* 1907-1909, and 1909-1911, it would appear that Mulan Mal was at Ferozepore doing "business for the firm, (pp 91 "A" l. 30 and 92 "A", l. 3). During the period with which we are at present dealing we find entries in the books regarding sums advanced to one or other of the three brothers and in each case the entry in the books is practically the same, no difference being made between Telu Mal and his brothers (see, *e.g.*, pp. 67 "A" l. 21-24; 68 "A" l. 1-4). Up to *Sambat* 1917 the family had not, of course, attained to the position which they now occupy and the expenses incur-

red by the brothers were comparatively small, but it will be seen from the summary given at p. 68 [“A.” ll. 8-19, that all these expenses were debited to the *Kharch Khata* of the shop, and that of the three brothers Mulan Mal was on the whole the most extravagant.

*Per se* these facts would be sufficient to prove that Mulan Mal was throughout joint with Telu Mal, though for business purposes he used to reside at Bilaulpur until about *Sambat* 1922, when he shut up the shop there and came to reside finally at Ferozepore. But in addition to all this, we have the admission of Tulsi Ram that so far as he can remember, Telu Mal and Mulan Mal were always together and that he cannot remember any instance when they were not together (p. 47 “A” l. 27).

As against these facts Mr. Dawarka Das has really very little to say. His first contention is that if Mulan Mal was joint with Telu Mal in the Ferozepore shop, it is passing strange that Mulan Mal's name was not substituted for that of Narain Das when the latter was separated off in *Sambat* 1917. This does not appear to us to be an argument of any great weight. Mulan Mal was at the time managing the Bilaulpur shop and perhaps no one realised so fully as he did, all that the family owed to the business capacities of Telu Mal. When Narain Das left the family, an entry to the effect, that henceforth the property of the shop was the joint property of Telu Mal, Mulan Mal and their mother, had been duly made in the books of the shop (“C.” page 58), and in face of this entry, it mattered little or nothing to Mulan Mal whether the shop was called by the name of Telu Mal-Nathu Mal or Telu Mal-Mulan Mal. His rights and interests were assured and he would, therefore, not trouble himself further, especially as in a small matter of this kind he would be reluctant to interfere with his brother's wishes.

The learned pleader's next contention is that Mulan Mal was all this time carrying on an independent shop of his own at Bilaulpur in partnership with one Jiwan Mal, and that the Bilaulpur and Ferozepore shops had no connection whatever with one another. A great deal of argument was addressed to us on this point, especially with respect to what happened when this Bilaulpur shop eventually closed, and to the wheat transaction to which reference is made at page 205 of Bk. “B.” We may at once state that this latter transaction remains a mystery and that the explanations of neither party offered a satisfactory solution of it. But it is clear from the corres-



pondence that there was an intimate connection between the business which was being done by Mulan Mal at Bilaulpur and that of the Ferozepore shop. Telu Mal is constantly giving advice to Mulan Mal as to various matters, and posting them up as to the prices current in Ferozepore. But what is even more important is that the Bilaulpur accounts, which have been produced, fail to show any personal expenses incurred by Mulan Mal, whereas the Ferozepore books show those expenses in detail. If Mulan Mal was an independent shopkeeper who had no concern with the Ferozepore shop, how comes it that his personal expenditure finds a place in the *kharch khata* of his brother's shop and does not appear in his own books?

It is true, no doubt, that Mulan Mal was at Bilaulpur in Sambat 1909 (1852) and that in the *khana shumari* papers of that year he is described as doing "grocery" work there (see "B." pages 24-25). But this fact proves little. The ancestral home was admittedly at Bilaulpur and it may well be that this small shop was the ancestral nucleus from the funds of which Telu Mal, by his genics, was enabled to rear up the Ferozepore business. It seems to us that the existence of this shop at Bilaulpur in no way militates with the view that Mulan Mal was jointly interested in the Ferozepore shop, while the other evidence, to which we have alluded, can leave no doubt upon the subject, as it is quite inconsistent with any other hypothesis than that of Mulan Mal's jointness with Telu Mal. Before proceeding, we may add one remark with regard to Mr. Dawarka Das' argument that if the Bilaulpur shop was but a branch of the Ferozepore business, one would not expect to find the former debited with small items for longcloth, etc., purchased for it by the Ferozepore shop. We cannot accept this argument. The shops had to keep proper accounts, even in small details, and it was absolutely necessary if these accounts were to be correct, that all items, no matter how small, should be duly entered in the books. Mr. Dawarka Das, seeing the force of this, argues that a small purchase of Rs. 2-6 worth of longcloth could not be intended for business purposes, and that Mulan Mal must have required it for his own personal use, and that if that were so, why was not the amount debited to the *kharch khata*? The learned pleader was not very clear in his argument on this point, but this is, we believe, the gist of his contention. If we are right in our surmise, we need hardly say more than that there is no reason to suppose

that those purchases were not for the purposes of business. The Bilaulpur shop was not exactly a Whiteley's establishment, and in *Sambat* 1909 it was doing only a small trade. At all events, the argument is admittedly based on pure conjecture and, as such, cannot carry us very far.

Great stress has been laid by plaintiff's learned pleader upon the so-called admissions made by Kishore Chand and Kanshi Ram, defendants, at various times after the death of Telu Mal, and upon certain assertions made by Telu Mal himself during his lifetime. We do not regard these statements as very important. In the years 1899, 1900, 1901 and 1902 the family was involved in considerable litigation and in the course of the many cases they had in hand, the two defendants were continually being examined and cross examined with regard to the nature and origin of the shop and its property, the result being that we have before us a number of copies of depositions made by one or other of them at various times and places. These are not very illuminating or consistent, and the utmost that can be said of them is that they show clearly enough that neither deponent had any real knowledge of the facts. To refer briefly to some of these admissions. On the 8th May 1899 Kishore Chand made the following statement before Pandit Barkishen Das, Munsif:— "Our family is joint. Telu Mal has "two shares, and Kishore Chand and Kanahi Ram have one "share. We all have a joint board . . . . Formerly Telu Mal, "being the senior man in the family, carried on the whole "business. It was for this reason that the whole business was "carried on in his name. Afterwards he became blind, 22 or "23 years ago, and since then we carried on the business . . . . "I do not know by whom the property was acquired. I was then "of tender age. Lala Telu Mal, my father, and the father of Lala "Tulsi Ram were joint." ("B." p. 117).

On the other hand, in certain documents filed by Kishore Chand in the year 1900 (*i.e.*, a few months after the above statement was made), he distinctly asserts that "Lala Telu Mal, deceased, acquired the entire property attached to the shop," (*see* pp. 118, 119, 120, "B"). But in two of these very same documents Kishore Chand maintains that Telu Mal himself and his brother were members of a joint Hindu family, and that upon that ground he and his brother were entitled to succeed by right of survivorship to the property of Nathu Mal in preference to the latter's widow. ("B." pp. 118, 120). Then, again, a few months later (in February 1901) Kishore Chand deposes that

he does not know whether any property was acquired by the late Telu Mal, (p. 122 "B," l. 7), and that he is unable to explain why it was that Telu Mal had a one-half share in the property, while he and his brother had only a one-fourth share (*ibid* l. 18).

It seems to us that the only possible explanation of these inconsistent statements is that offered by Mr. Kirkpatrick. The learned counsel points out that the defendants' father, Mulan Mal, died in 1875 (*Sambat* 1932) when defendants were quite children; that obviously they had no personal knowledge of matters that occurred so long ago as 1852, and that they were entirely dependent for any information as to the nature of the family and its property, upon their uncle, Telu Mal. But Telu Mal was about this time—and certainly later on—obviously attempting to make out that he had "acquired" the Ferozepore shop and had made it what it was. To a large extent this was true and there was no one to gainsay him, for Narain Das, though alive, had no further interest in the matter as he had been separated in *Sambat* 1917. That Telu Mal was putting himself forward as the author and founder of his wealthy shop is clear from the statement he made on the 1st May 1893 before the Assistant Collector ("B." p. 239). He there asserts that "the entire property referred to in the application for partition was acquired by me exclusively." To a like effect is the statement made by him in 1889 (10th April). But the value of these pretensions on the part of Telu Mal may be gauged by the fact that on the last occasion above-mentioned, he had the temerity to claim the sole ownership of that very village (*mauza* Baghel Singhwala) with regard to which we have an acknowledgment in his own hand-writing that his two brothers were co-sharers and that the purchase money came from the shop funds ("B." p. 189). The truth is that Telu Mal, especially after the death of Mulan Mal, led his relatives and friends to believe that he had acquired the whole property, and we have no doubt that this was the story that the boys, Kishore Chand and Kanshi Ram, heard from their uncle. They seem to have accepted it as true, though (as is clear from Kishore Chand's various statements) they found it difficult to reconcile the disparity of shares with the admitted jointness of themselves and their uncle. It was never denied by Telu Mal that Mulan Mal was joint with him and everything on the record, including plaintiff's own statement (p. 77, "A"), shows that in respect of board and lodging at all events the two



branches of the family were one and undivided. But Kishore Chand and his brother had no reason to distrust the assertions of their uncle who was, in truth, more a father than an uncle to them. As Kishore Chand has remarked, they obeyed him implicitly, and we see no reason to doubt defendant's veracity when he swears that it was only when he came to make a thorough examination of the shop's account books, for the purposes of this present case, that he began to realize more and more that he had been in error in supposing that Telu Mal had acquired the entire property. It is for this reason, then, that we do not attach such weight to these statements as admissions by defendants usually carry. Nor must it be forgotten, that if in times past defendants have described Telu Mal as the founder and original owner of all this property. Tulsi Ram, on the other hand, was at an early stage, asserting that the family was originally joint, and that Mulan Mal and Narain Das had an equal hand in the acquisition. Thus, on the 4th July 1900, when plaintiff applied for mutation of names after the death of her husband, Nathu Mal, Tulsi Ram stated he had no objection to offer, and added that Telu Mal, Mulan Mal and Narain Das all helped to acquire the property. In his evidence given in the present case he explains that he originally imagined that all three brothers worked together and had built up the business, but that after a consultation he had had with Lala Kashi Ram, pleader, and a talk with Nathu Mal's mother, he learned that Telu Mal was the "sole acquirer of the property." In our opinion these earlier admissions on the part of Tulsi Ram are far more important than any statements by the defendants as to the origin of the property. Tulsi Ram was a much older man and had been "taken back" into the shop by Telu Mal so long ago as 1876 in order that he might conduct its management. He must therefore have had considerable knowledge of its affairs and this too at first hand. His own father, Narain Das, was alive (he died in March 1900) and we can hardly believe that Narain Das never at any time enlightened his son as to the affairs of the shop of which he had now become the manager. It must then have been with full knowledge of the history of the shop that Tulsi Ram made his statement before the Revenue authorities, and we can hardly accept the suggestion that Nathu Mal's mother, Mussammat Sahib Devi, had fuller and more accurate knowledge of the past than Narain Das. It seems to us far more probable that Tulsi Ram's change of front was due to his consultation with the legal gentleman to whom he refers, and from whom he not improbably gathered that Mussammat Nihal

Devi could not hope to succeed to Nathu Mal's share if the family were joint in property, and that his own chances of succession to any part of that property would be equally infinitesimal in that event. On the other hand, if the property was not joint, Mussammat Nihal Devi would certainly be her late husband's heir and after her death, Tulsi Ram would be a co-heir with his cousins, the defendants, to all her estate. It is scarcely matter for surprise, therefore, though it may be for regret, that Tulsi Ram's memory suddenly became defective and that he felt compelled to ask for information from Telu Mal's aged widow.

There is one other argument which Mr. Dawarka Das urged before us in support of his contention that the family was not joint at any time prior to Sambat 1917, and that is that there are a number of deeds on the record in favour of Telu Mal alone or executed by him alone. In this connection reference was made to p. 47 of book "A" and to pp. 48, 74, 92 and 175 of bk. "B." It will be seen that, with the exception of the last, all these deeds were executed by Telu Mal in favour of third parties and relate to sales of various properties stated to belong to Telu Mal exclusively. But it is by no means unusual to find the manager of a joint Hindu family executing sale deeds in his own name, and as we shall presently have occasion to point out, even after the alleged partition of 1893, we find Telu Mal joining in a sale of certain lands which, according to the application of the 7th March 1893 ("B" p. 108) fell to the share of Kishore Chand and Kanshi Ram (p. 75 "A" l. 26; p. 245 "B"). When property is being sold by the joint family to third persons, it is obviously immaterial to the members of the family whether the sale deed is executed by one member or by them all. The case is, however, different when the family purchases property and the endorsement on Exhibit D. II A ("B" p. 189) is an instance in point to show that Mulan Mal and Narain Das were fully alive to the risk of allowing a purchase of property to stand in the name of one member alone. For this reason there is some force in Mr. Dawarka Das' argument when we come to deal with Exhibit D. X. ("B" p. 175) which relates to the purchase of certain property on the 17th March 1850. But this property was after all of very small value (Rs. 42 was paid for it) and it is likely enough that in days past, when the brothers were first starting their business, there was a more complete confidence in each other than was the case later on. And we must in this connection remember that the actual deed relating to the pur-

chase of Baghel Singhwala is also in the sole name of Telu Mal, and it is common ground to both sides that the endorsement was made subsequently. But be the explanation what it may, we clearly cannot on this very trivial piece of evidence hold that the family was not joint in 1850, the evidence to the contrary being overwhelming.

We now pass on to consider the argument that even if this family, consisting of the three brothers and their mother, was originally joint, the separation of Narain Das in Sambat 1917 effected a disruption of the entire family. Mr. Dawarka Das contends, that it is not necessary for him to show that there was an actual division, by metes and bounds, of all the property and that it is enough if he can prove that one of the members of the family left it, taking with him his share of the property, and that as regards the other members, though there might not have been a division of the property, there was a division of their respective titles by specification of shares. Now, it is admitted that Narain Das actually left the family and that his share was divided off by metes and bounds. Further, it is clear from the entry at p. 58 of book "C" that there was a specification of the shares of the three remaining members, *vis.*, Telu Mal, Mulan Mal and their mother. The question is whether upon these facts *simpliciter*, we must hold, as a proposition of law that there was an entire disruption of the joint family. The authority cited by Mr. Dawarka Das in support of this argument is *Bala Bux v. Rukhmabai*, <sup>(1)</sup> in which case their Lordships of the Privy Council held that "when one co-partner separates from the others, there is no presumption that the latter remains united. In many cases it may," say their Lordships "be necessary in order to ascertain the shares of the outgoing member, to fix the shares which the other co-partners are or would be entitled to, and in this sense the separation of one is said to be a virtual separation of all. And their Lordships think that an agreement amongst the remaining members of a joint family to remain united or to re-unite must be proved like any other fact." This authority is undoubtedly in point, for here it was certainly necessary in order to ascertain the share of Narain Das (who was to be separated), to fix the shares of the three other co-parcenors and in point of fact this was actually done, (see the entry at p. 58 of book. "C"). We must take

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(<sup>1</sup>) (1908) I. L. R. 30 Cal. 725.



it, therefore, that there was a "virtual separation" of all the members. The question then is, whether from what occurred subsequently we can infer an agreement between Telu Mal, Mulan Mal and their mother to remain joint. In the case before their Lordships the evidence on this aspect of the question was very conflicting and they point out that "there is no doubt some evidence both of a continued union between Girdhari Lal and Ladhu Ram, and against it. On the one hand, the absence of any proof of an actual division of property between Girdhari Lal and Ladhu Ram and the fact of the former having taken the appellant and his mother back to the ancestral home are evidence of the two brothers having agreed to remain united. On the other hand, the fact of Ladhu Ram having sent his wife to reside at Bhortida and himself leaving the ancestral home (though it is said for a pilgrimage only) and the evident and expressed desire of Girdhari Lal, concurred in by the appellant and his mother until 1894, that the appellant should be treated as entitled to one-half the business and property, is evidence in the contrary direction. But the evidence either way is too slight to prove a satisfactory basis for decision." In the case before us, however, there is, we consider, conclusive evidence that Telu Mal, Mulan Mal and their mother agreed to remain joint at the time when Narain Das left the family. It is clear from the correspondence and from the facts of the case that the separation of Narain Das was against the wishes of Telu Mal, and it is not too much to say that there was no reason whatever why the other members of the family should disunite simply because Narain Das had made up his mind to start business on his own account. But these are merely *a priori* reasons and we must necessarily turn to something more definite to show that the "virtual separation" was not in reality intended to be a separation at all. In the first place we have the entry at p. 58 of book "C" in which it is distinctly stated that the three other shares (of Telu Mal, Mulan Mal and their mother) will remain with (*Telu Mal ke pas rahiyan*). *Per se* this indicates that there is to be no separation as regards these three shares and that Telu Mal is to be (as heretofore) the trustee-manager of the property belonging to the three shareholders.

In the next place we have a great deal of evidence which shows, or at all events implies, that Mulan Mal had agreed to to continue joint with his elder brother. His wife lived at

Ferozepore with Telu Mal (see the evidence of plaintiff at p. 77 "A." l. 41; of Mussammat Sahib Devi at p. 107 "A." l. 23; and of Tulsi Ram, p. 47 "A," l. 26). His children were born at Ferozepore and their birth expenses were duly debited to the *kharch khata* of the shop (see "A" pp. 29, ll. 7, 12; 31, ll. 4-6). Kishore Chand and Kanshi Ram were both married at Ferozepore and the expenses of their marriage ceremonies were also debited to the shop's *kharch khata* ("A" p. 29, l. 13; p. 31, l. 18-24); so also were the expenses connected with the education and maintenance of Kishore Chand and Kanshi Ram ("A," p. 31, l. 1 and l. 14). The birth expenses of the children of Kishore Chand and Kanshi Ram were similarly debited (see e.g., pp. 30, l. 27 and 31, l. 38). The cremation and other expenses in connection with the death of Kishore Chand's first wife are also debited to the *kharch khata* ("A." p. 33, l. 1-2). It is further admitted that Mulan Mal, when he closed the Bilaulpur shop in *Sambat* 1923, came to Ferozepore and lived jointly with Telu Mal to the day of his death, and the account books are full of items relating to expenses incurred by Mulan Mal and his wife and all these expenses are duly debited to the *kharch khata*, with the exception of one small item of Rs. 25 which, for reasons best known to Telu Mal, was not so debited. As instances of the expenses to which we allude, we may refer to the following :—

(1) An item of Rs. 25-8-9 is debited to the shop of Telu Mal-Narain Das on account of expenses incurred by Mulan Mal when going home ("C." p. 382).

(2) Mulan Mal receives the sum of Rs. 48-14-6, and this is debited to the *kharch khata*, ("A." p. 67).

(3) A similar item appears in the *bahis* of *Sambat* 1917-1923 in close conjunction with a like item relating to the expenses of Telu Mal (p. 69 "A." l. 27-30).

(4) Then we have several entries with regard to expenses incurred by Mulan Mal's wife in going to her father's home at Kasur; all these are debited to the *kharch khata* of the shop (see p. 70, "A" l. 25 to bottom of page).

(5) The expenditure incurred by the ladies of Telu Mal and Mulan Mal's branches are debited to the *kharch khata* (see p. 35 "A" l. 14 *et seq.*). Then we have the fact that when Telu Mal died in 1897, Tulsi Ram and Narain Das (as being separated members of the family) gave Rs. 25 *ba taur pagri*, whereas neither Kishore Chand nor his brother, Kanshi

Ram, (as being united members) gave anything on that account, (p. 33 "A." l. 21). And the expenses in connection with the funeral ceremonies of Telu Mal were debited to the *kharch-khata* (*ibid*, l. 24). Then again, on the death of Nathu Mal, plaintiff's husband, Tulsi Ram and Narain Das again contributed a sum of money *ba taur pagri*. And in connection with the death of Nathu Mal, it is a most significant fact that the *Kirya Karm* ceremonies were performed, not by Tulsi Ram but by Kishore Chand. The latter has deposed that Tulsi Ram would, but for his separation, have been the proper person to perform these ceremonies, but that as Tulsi Ram had been separated off, the duty fell to him as being a member of the united family, (p. 33 "A." ll. 33-40). No attempt has been made by Tulsi Ram or any one else to controvert the correctness of this assertion and to our mind it carries the very greatest weight as we know the importance which Hindus of the *Khatri* class attach to the performance of such ceremonies. Before passing on we would briefly refer to the uncontradicted statement by Kishore Chand that while all the expenses connected with the *Tirath*, *pūja*, etc., of Telu Mal, Mulan Mal, Nathu Mal and defendants were duly charged in the *Kharch Khata* throughout, practically none of the expenses of Narain Das or Tulsi Ram of the like kind are so charged between the years *Sambat* 1917 and *Sambat* 1933 when Tulsi Ram was brought back by Telu Mal, (see "A" p. 34 ll. 20-25). Next we may briefly refer to the question of *Neotras*. These are contributions made on certain occasions such as marriages by persons other than members of the joint family. Tulsi Ram explains the matter as follows:—" *Neotra* is given by both men and women. In a joint family, if all members have the same connection, *Neotra* is sent in the name of all; if the connections are separate, contributions are sent separately. If the male members of the house are joint, *Neotra* is not exchanged between them. Before I joined I never sent one common *Neotra* along with the house of Telu Mal. After I joined, if the connection of us all was the same, a common *Neotra* was sent by the male members. I myself paid no share of such common *Neotra*. It was paid by the firm.....During the period I was joint, two of my daughters were married. Neither Telu Mal, Nathu Mal nor the defendants sent any contribution..... When Kishore Chand's sister was married I made no contribution ..... After my separation Kanshi Ram's son was married, I made a contribution as *shagun*, not as a *Neotra*. I do not remember which it was. On looking up my *bahi* I find



“that Rs. 5 were given by me as *Neondra* . . . . I may “have made a similar contribution at the time of Kishore Chand’s daughter’s marriage. I have looked at my books. I did “not give any *Neotra* but I gave two ornaments worth Rs. 51” (“A” pp. 92-93). On the other hand, Kishore Chand asserts positively, and his statement is corroborated by an entry in the account books, dated *Jeth Badi* 2nd 1953, that on the marriage of his daughter, *Mussammatt Daropti*, an item of Rs. 51 was received from *Tulsi Ram-Narain Das bataur Neondra*, and he further adds that *Telu Mal-Nathu Mal* did not contribute. We see no reason to disbelieve this evidence as there would appear to be no ground for *Tulsi Ram* not contributing a *Neotra* on the marriage of Kishore Chand’s daughter when he had admittedly contributed a *Neotra* on the marriage of *Kanshi Ram’s* daughter. It will be noticed, however, that *Tulsi Ram* is careful not to deny the fact; he admits he gave ornaments to the value of Rs. 51 but he professes ignorance as to whether this gift was or was not by way of *Neotra*. Taking all these facts into consideration, we think it is impossible to hold that there was any separation in *Sambat* 1917 between *Telu Mal* and *Mulan Mal*. On the contrary, there was absolutely no motive for any such separation, and if in point of law we must hold that the specification of shares in the entry at p. 58 of Bk. “C” amounted in law “to a virtual separation,” we have no hesitation in holding that the subsequent conduct of the parties shows that no real separation took place at that time between *Telu Mal*, *Mulan Mal* and their mother, or that if it did take place for the moment the three latter must be taken to have agreed forthwith to remain united or to re-unite. In a case of this kind oral evidence is naturally of no great value, but we have here the testimony of plaintiff’s own witnesses which corroborates the other evidence. The first witness, *Ram Rakha Mal*, admits that he has known the family for about 40 years and that “when any occasion of marriage arose, one *bhaji* was sent to “*Narain Das*, *Tulsi Ram*, and one to *Telu Mal*,” and that he “did not send any for defendants . . . contributions were “received from *Tulsi Ram* and from *Telu Mal*. Defendants “names were not mentioned,” (“A” p. 13). *Sardar Gurmukh Singh* (P. w. 2) is a pleader of *Ferozepore*, who knew *Telu Mal* and the family from 1890 or 1891, and he states positively that *Telu Mal* and defendants were joint and that their dealings were all joint. *Lala Ram Sukh Das* (P. w. 4) another pleader, states that defendants and *Telu Mal* were joint; that they used

to live in the same house and had joint dealings and held their land jointly, but that Telu Mal was "looked on as the manager "of the concern" ("A" p. 15).

*Mussammatt Nihal Devi*, plaintiff, herself admits that when she married, Nathu Mal, Telu Mal, Mulan Mal and her husband and their wives all lived in the same *haveli* (p. 77 "A.").

*Tulsi Ram* (who is practically identified with the plaintiff) also deposes that "Mulan Mal and Telu Mal used to eat together "and their families after Mulan Mal came to Ferozepore. Up to "the death of Nathu Mal, Mulan Mal and his sons and the ladies "of his family used to feed together with Telu Mal . . . . So "far as I can remember, Telu Mal and Mulan Mal were always "together. I cannot remember any instance when they were not together" ("A." p. 47). And finally, we have the statement of *Mussammatt Sahib Devi*, widow of Telu Mal, to the effect that even after 1893 defendants remained joint with Telu Mal and this despite her entreaties that they too should be separated off, ("A." p. 107, l. 2). In face of all this evidence it would, in our opinion, be impossible to hold that when Narain Das was separated off in *Sambat* 1917 (A.D. 1860), the other members of the family did not agree to remain united.

With reference to all these facts, Mr. Dawarka Das replies that Telu Mal also undertook the expenses connected with the education and marriage of Ganga Ram's family. It appears that Ganga Ram was the son of Telu Mal's sister, and while it is true that Telu Mal did make provision for Ganga Ram and his family, Kishore Chand points out that there was a very considerable difference in the way that the latter and his family were treated. His father died when he was quite young and he was taken into the service of the firm as *munim*, receiving no pay but being maintained by the firm. When too old to do any further work, he was pensioned off with a *bonus* of Rs. 10,000 (p. 74 "A." l. 43). Kishore Chand refers to various entries in the books from which it is clear that Ganga Ram and his son, Bihari, were treated very differently from defendants and the other members of the family (p. 75 "A."). From the evidence on the record it is clear that Telu Mal and Mulan Mal were not devoid of the milk of human kindness and we cannot, therefore, infer from their kind treatment of their sister's son, that Telu Mal and Mulan Mal were not joint simply because as a matter of charity, they defrayed certain expenses of their sister's son,

Mr. Dawarka Das did not go to the length of suggesting that a joint Hindu family was not to be regarded as joint because its members thought fit to support an indigent son of the managing member's sister. His argument that the fact that the heavy expenses incurred by Mulan Mal and his family were debited to the *Kharch Khata* carries no weight in face of the fact that the shop also bore the expenses of Ganga Ram and his family, might have had force if he could have shown that Ganga Ram and his son were treated in the same way in which Mulan Mal and his descendants were treated, but of this there is no proof whatsoever. On the contrary, from the few entries in the books relative to Ganga Ram and his son, we see that a very great difference was made between them and defendants, and no one, not even Tulsi Ram, has ever ventured to say that Ganga Ram was in any respect joint with Telu Mal. On the other hand, there is a mass of evidence in corroboration of the defendants' plea that their father and they themselves were in all respects joint with that person and that this jointness continued up to the date of Nathu Mal's death.

We must accordingly hold that even if the separation of Narain Das in *Sambat* 1917 effected in law a virtual separation of the other members of the family, there must have been an agreement between the latter to remain united despite the withdrawal of Narain Das from the joint family. Upon this point we are in entire accord with the finding of the District Judge and to hold otherwise would, we think, be to decide *contra* to the facts of the case. After his separation Narain Das confined his attention to the management of the shop, Ditta Mal-Narain Das which had been started for his benefit in *Sambat* 1914. This shop was made over to him as his individual property in *Sambat* 1917, but it had unquestionably been started with funds from the shop of Telu Mal-Narain Das and when the accounts were made up in *Sambat* 1917, the money spent on it was duly taken into consideration. We may here be allowed to anticipate events by saying that Narain Das appears to have made a failure of this business and that in *Sambat* 1933 his son, Tulsi Ram, was only too pleased to leave it and to enter the prosperous shop of his uncles. Tulsi Ram admits that he brought nothing with him when he joined Telu Mal-Nathu Mal, and it is obvious that the shop of "Ditta Mal-Narain Das" must have closed its shutters either before *Sambat* 1933 or in that year.

The business of Mulan Mal at Bilaulpur was hardly more successful and in 1923 *Sambat* the shop which was known as



"Mulan Mal—Jiwan Mal" terminated its career. In that year Mulan Mal came to Ferozepore and it is amply proved (and indeed not denied) that he thenceforth lived with his wife and his family in the big *haveli* which Telu Mal, with an eye to the future, had purchased for family purposes in November 1855 (Exhibit D. XII, p. 185 of bk. "B"). It was in this *haveli* that the defendants and their own issue were born and Telu Mal, Nathu Mal, Mussammat Sahib Devi and plaintiff herself had their residence. Telu Mal's old mother *Mussammat* Raj Devi also came to live in this house in *Sambat* 1923 when Mulan retired from *Bilaulpur* and it was in this house that she died in *Sambat* 1928. It would seem that from *Sambat* 1923 Mulan Mal took an active part in the management of the Ferozepore business. He died in *Sambat* 1932 and it is admitted that about that time Telu Mal had become more or less blind and incapable of doing active work. Accordingly when Mulan Mal died, he had to find some one to take the latter's place and it is not surprising that he decided to bring in Tulsi Ram, the young son of Narain Das, as the manager. Defendants were at the time mere boys and Narain Das had shown himself to be incapable. It was only natural, therefore, that Telu Mal should look to his young nephew as the best suited person for the post of manager. In *Sambat* 1933 accordingly Tulsi Ram was induced to undertake this post. It is not very easy to say what Telu Mal's intentions with regard to Tulsi Ram were at that time. Natural affection would, no doubt, prompt him to re-unite his nephew with him and with defendants, but he would seem to have been aware of the fact that according to the principles of Hindu Law, a legal re-union between him, defendants and Tulsi Ram was not possible inasmuch as Mulan Mal was then dead. We say that this idea was possibly in his mind because it is in evidence that when Tulsi Ram was introduced into the business as manager in *Sambat* 1933, all that Telu Mal promised him was, that he would eventually get an equal share with defendants in the property. Tulsi Ram and his father Narain Das must, of course, have fully realised that in the circumstances it was not open to Telu Mal to give the first-named a share in the joint family property, but it was obviously not for Tulsi Ram or Narain Das to object to the proposal. Tulsi Ram, however, knew that Telu Mal was a masterful man and that the defendants were mere children and under his thumb. He, therefore, accepted the situation, and up to the year *Sambat* 1941 (1884) worked with Telu Mal in reliance upon the promise made in *Sambat* 1933. In *Sambat* 1941, however, Kishore Chand had just attained his majority and we have little

doubt that it was in consequence of this fact and because he felt his position rather insecure that Tulsi Ram induced Telu Mal to give definite effect to the promise that had been made to him in *Sambat* 1933. Tulsi Ram himself states that in 1884 he brought it to the notice of Telu Mal that there was considerable difficulty in getting the Revenue authorities to accept him as the agent of the family, and that he suggested that the best way out of this difficulty would be for Telu Mal to apply to the Revenue authorities to effect mutation of names in favour of the various members of the family, ("A" p. 76. ll. 7-35). The result of this suggestion (which was obviously due to Tulsi Ram's anxiety to secure his rights before Kishore Chand could dispute them) was that on the 11th November 1884 an application was presented to the Revenue authorities by Telu Mal, accompanied by Tulsi Ram (see Bk. "B" pp. 103-104). In this application Telu Mal prays that the names of the parties therein mentioned may be recorded in the Revenue papers as entitled to the shares specified. Entries in accordance with this application were accordingly made.

Mr. Dawarka Das contends that, no matter what may have been the state of the family previously, this application effectually "divided" the members of the family, inasmuch as it amounted to a separation or division of title. We cannot possibly accept this contention, and indeed it is directly opposed to plaintiff's own contention that there was a separation in 1893. If the family were disunited in 1884, what reason was there, it might well be asked, for them to separate again in 1893? But the position taken up by the learned pleader is also opposed to the evidence given by Tulsi Ram himself, for the latter has sworn that it was only after this application of 1884 that he assumed to be a co-sharer in the firm (see p. 76, l. 42). In other words, while Mr. Dawarka Das regards this application as a disunion of the family, his client (for Tulsi Ram was the real plaintiff in this case) treats it as a reunion! Both Tulsi Ram and Kishore Chand are agreed that this application was not intended to effect a partition between the members of the family. Tulsi Ram asserts that its one and only object was to remove the difficulty that had been experienced about powers-of-attorney. Probably this difficulty had struck Telu Mal himself and in his old age he possibly did not see that Tulsi Ram had an obvious ulterior motive. But be this as it may; it is on the evidence absurd to contend that an application which was intended by the parties to unite the members of the family more closely, had the exactly opposite effect, despite their intentions, of disuniting them. An-

other objection, however, to Mr. Dawarka Das' contention is that Kishore Chand, though a member of the joint family and though admittedly of age in 1884, was no party to this application. It is impossible, therefore, to hold that it effected a partition of the property. But as we have remarked, not one member of the family ever regarded this application as any thing more than a specification of the shares which the parties were to hold in the property, and no one has suggested that at the time it was preferred to the Revenue authorities, any member of the family separated from the others. We shall presently have to deal with the alleged partition of 1893 and we may conveniently reserve for the moment the question whether in point of law there could be any partition between Telu Mal defendants and Tulsi Ram in view of the fact that the last named was not legally a member of the joint family, and the further question whether an application to the Revenue authorities to effect mutation in the names of the individual members of the family amounts *per se* to a separation of the family *qua* the family property. We refrain therefore at present from discussing the ruling of their Lordships of the Privy Council in the case of *Parbatí v. Nau Nihal Singh* (1) which has been cited in connection with this alleged partition of 1884. All that we need say at present with regard to those proceedings is that it apparently never struck any of the parties that the application made by Telu Mal, at the suggestion of Tulsi Ram, effected a separation of the family at the very moment when Telu Mal and Tulsi Ram intended to strengthen the position of Tulsi Ram as a member of the family and a co-sharer in the property. Nor can we see how Mr. Dawarka Das' argument can possibly help his client. We have already found that Narain Das and Tulsi Ram were separated off in *Sambat* 1917 and we are further satisfied that Telu Mal and Mulan Mal were members of a joint family and that the property in dispute belonged to this joint family. Now, it is not contended that Tulsi Ram had any right to or interest in the property prior to *Sambat* 1941 (1884), or that he was in any way re-united prior to that date. But if at the very moment that he is supposed to have been re-united, he was in fact (if such an absurdity can be considered) actually disunited, the proceedings of 1893, upon which so much stress has been laid by plaintiff's counsel, must be entirely ignored. A man who was separated off in 1884 cannot well, either in law or in fact, be again separated off nine

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(1) (109) I. L. R. 31 All. 412 P. C.



years later. But, of course, this is not plaintiff's case nor did Tulsi Ram ever suggest so absurd a contention. Plaintiff's story is that Telu Mal was the sole owner of the property and that in 1884 he gave portions of his property to his nephews. But if this story is not accepted, and if it is held that Telu Mal and Mulan Mal were joint in property, after the separation of Narain Das in *Sambat* 1917, she contends that Tulsi Ram was brought into the family in 1884 and subsequently separated off in 1893. She further contends that in 1893 there was a complete disruption of the family and that thereafter each branch enjoyed its own share of the property, although no actual division by metes and bounds may have been made. We need not further discuss the proceedings of 1884, for it is clear that no "separation" occurred at that time. Tulsi Ram himself is quite clear upon this point, though he would have us believe that both he and his father became joint with Telu Mal and defendants and that this occurred in *Sambat* 1933. He adds "when I became joint, I became joint as a *hissadar* and "my father with me. In *Sambat* 1950 (1893) a partition took place. I got the fourth share that had been promised to me "in *Sambat* 1933. At the time of joining, the dealings in the "names of Narain Das-Tulsi Ram were incorporated in the "firm of Telu Ram-Nathu Mal. *All items from Sambat 1933 to "Sambat 1950 were in the name of the firm Telu Mal-Nathu Mal as regards food, etc.* The items in the names of "myself and my father were all entered in the common *Khota* "of profit and loss." ("A" page 48, l. 26 *et seq.*) He subsequently admitted in cross-examination that though he was promised a share in *Sambat* 1933, no share was actually fixed till *Sambat* 1941 (1884), and he continues: "The separation in 1893 took "place because I became an honorary magistrate and president of "the municipal committee and hence was not able to exert my "energies to the business. Thus Telu Mal became annoyed, "and also on account of my expenses, and so he separated me off. "He was angry at the time. He did not separate me off of his "own will and kept putting it off until finally I pressed him too "much and he gave in" (page 76 'A'). There are on the face of it many discrepancies in this evidence, but it is impossible to ignore the broad fact that Tulsi Ram dates his separation, not from 1884 when according to him he became a *hissadar* in the family, but from 1893. His evidence upon this point is, to our minds conclusive, for obviously no one, except Telu Mal, was so thoroughly conversant with the actual facts. Despite Mr. Dawarka Das' argument therefore we may safely assume that

there was no disruption of the family in 1884. We may now proceed to a consideration of the proceedings of 1893, but before dealing with them we may briefly refer to certain other matters of an earlier date. From the statements of Tulsi Ram to which we have already alluded, it is clear that that individual had been anxious for some time prior to March 1893, to effect his separation from the joint family. Like his father, Narain Das, who after some years struggling with Telu Mal, induced the latter eventually to agree to a separation in Sambat 1917. Tulsi Ram would appear to have pressed for a separation some years prior to 1893. In Sambat 1948 (or A.D. 1891) it would appear that separate *khatas* were opened in the respective names of Telu Mal, defendants and Tulsi Ram, and the explanation offered by defendants is, that these *khatas* were commenced with the object of subsequently separating off Tulsi Ram, whose conduct had displeased Telu Mal ("A" p. 24, l. 10). Tulsi Ram admits that these separate *khatas* were started in that year ("A" p. 48, l. 38) and also, as we have seen, that he had been pressing Telu Mal to divide him off. The fact that the separate *khatas* were started with the object of effecting a separation of Tulsi Ram and with that object only, is further apparent from the evidence of that person to the effect that "the *khatas* between Sambat 1948 to Sambat 1950 "were all collected together and the whole earnings having thus "been obtained, partition was effected. These calculations were "not made in the *bahi* and hence they are not to be found now. "They were made on a separate paper. *The only entry is as to my "share. . . . No partition money was then credited to "the khata of Kishore Chand-Kaushi Ram, and similarly in "the case of the khata of Telu Mal-Nuthu Mal, so far as I "have seen, there is no entry or note, showing their share of the "partition money"* (p. 94, "A", l. 26). There can, we think, be little doubt upon these admissions by Tulsi Ram himself that the possibility of separating him off from the other members of the family was present to the mind of Telu Mal in 1891, and that in view of this possibility Telu Mal adopted in that year the very same course of action that he took in Sambat 1914 (1857) when Narain Das was so anxious to start business for himself. He opened the separate *khatas* in order to effect a proper distribution of the property. True, that he had legally no power to make this distribution, but we must remember that the defendants were even in 1893 comparatively young men, under the influence of their masterful uncle, and in all probability as anxious to get rid of Tulsi Ram as the latter was anxious to go. But even Tulsi Ram is obliged to admit

that Telu Mal was much averse to this separation, and that he kept on deferring action, until he was eventually forced by Tulsi Ram's importunity to agree to it. This is a most important fact to be kept in mind when we have to deal with the proceedings of 1893. If Telu Mal was opposed to the separation of Tulsi Ram, and if he agreed to it only under compulsion, is it at all likely that he would go further and effect a separation between himself and the sons of Mulan Mal, to whom he had been *in loco patris* for some 18 years and to whom he seems to have been most devotedly attached? For such separation there was absolutely no motive. The defendants were, so far as we can gather from the evidence on the record, affectionately disposed to their uncle, and he on his part regarded them as his own sons. Nathu Mal, his son, was practically an imbecile, and it is in the highest degree improbable that Telu Mal in his old age, when he was himself incapable of managing the huge business of the Ferozepore shop, would go out of his way to separate off Kishore Chand and Kanshi Ram at a time when the latter were beginning to understand the working of the shop and were in a position to take the place of Tulsi Ram, who had, to his displeasure, determined to leave the business. Such then was the position of affairs when the proceedings of 1893 took place, and *a priori* it would seem incredible that either Telu Mal or defendants intended by the proceedings to effect anything more than the "separation" (if so it can be called) of Tulsi Ram. And that this *a priori* argument is correct, is shown by the positive evidence of Mussammat Sahib Devi, the widow of Telu Mal, who, as a witness for the plaintiff, admits that when Tulsi Ram was separated off, "the defendants remained joint, although I kept on saying that they should be separated off. Telu Mal, however, kept putting off." ("A" p. 107, ll. 2-4).

With these prefatory remarks, we now pass on to a consideration of the proceedings which commenced with the application, dated the 7th March 1893 ("B," p. 108). This was an application, signed by Telu Mal, Tulsi Ram, Kishore Chand and Kanshi Ram and was addressed to the Assistant Collector, 1st grade, Ferozepore. In it the applicants set forth the various immovable properties that were henceforth to be held by them in severalty, and it was prayed that each co-sharer may in the revenue papers be separately shown as owner of the culturable lands of his share "as defined above," and it was added that the debts due to the firm, lands mortgaged to the same and all other shop dealings had not been partitioned but were joint as before. Apparently there was considerable



discussion about the terms of this application, for though it is dated the 7th March, it was not actually presented to the Assistant Collector till the 26th April ("B," p. 236). On that date Telu Mal, who was accompanied by Tulsi Ram, Kishore Chand and Kanshi Ram, appeared before the Assistant Collector, presented the petition above referred to and prayed (1) that the names of himself, Kishore Chand and Kanshi Ram should be removed from the entries regarding the villages which had fallen to the share of Tulsi Ram, and that the latter should thereafter be treated as sole and exclusive owner of these villages; (2) that Kishore Chand and Kanshi Ram should be regarded as sole and exclusive owners of all the house and landed property which had fallen to the lot of the applicant himself and Kishore Chand and Kanshi Ram, and that the applicant's name should be removed from the entry regarding the ownership of the said villages; and (3) that the debts, mortgages, etc., of the firm should remain as heretofore joint, and that Rs. 10,000 should be paid out of the joint funds to Gauga Ram, the son of Telu Mal's sister. On the same date Kishore Chand and Kanshi Ram stated before the said Assistant Collector that Tulsi Ram was henceforth to be regarded as the sole owner of the property which had been assigned to him, and added, "similarly we shall have the same rights in respect of the property of our own share and also that of the share of Lala Telu Mal as those of 'Lala Tulsi Ram in the property of his own share,'" and they explained that this partition was not to be deemed to affect the debts, mortgages, etc., of the firm, which were to remain joint "as before," (Book "B," pp. 238-239). It is not very clear what happened after this, but there can be no doubt that the statement made by Kishore Chand and Kanshi Ram on the 26th April 1893 was not agreeable to the other members of the family, for on the very next day we find them coming forward before the same revenue officer and modifying that statement. In this latter application they admit that Lala Nathu Mal is also along with them entitled as owner to all the immovable property which fell to their share under the said partition and also to the other property which fell to Lala Telu Mal and which he caused to be entered in their names. They go on, in this application, to say that "we and Lala Nathu Mal are all three owners of and heirs to the said property in equal shares," and they ask that mutation of names may be effected in their and Nathu Mal's name. The statement concludes with the remark, "If Lala Nathu Mal dies without any male issue the property of his share will devolve upon us, Lala Tulsi Ram shall have no right whatever to the said property." On the

1st May 1893 Telu Mal himself appeared before the Assistant Collector and after asking that the names of himself and the defendants should be removed in respect of the villages that had fallen to Tulsi Ram's share, he prays that as regards the other villages, mutation of names should be effected in his name and in the names of defendants according to the shares specified before, *i.e.*, that two shares should be shown in his name and one share should be shown as the joint property of defendants. He further adds, "After my death Nathu Mal, my son, will succeed to my share. After the death of Nathu Mal, Tulsi Ram will have nothing to do with the shares entered in my name in case he (Nathu Mal) leaves no male issue. Kishore Chand and Kanshi Ram will succeed to and become proprietors of my share. The entire property referred to in the application for partition was acquired by me exclusively. I have given the property by partition to Tulsi Ram, Kishore Chand and Kanshi Ram because they are my kinsmen and my nephews," ("B," pp. 238-239). We have already given reasons for holding that the latter assertions by Telu Mal were not true and that he did not himself acquire this property, and upon this point we need say no more at present. On the same day Kishore Chand and Kanshi Ram also appeared before the Assistant Collector and prayed that in respect of all the villages, etc., that had not fallen to the share of Tulsi Ram, the entry as to ownership might be made as follows:—Telu Mal, two shares, themselves one share. They added that after the death of Telu Mal, his son Nathu Mal would inherit his shares, and that if Nathu Mal died sonless, they would succeed to his property, the mother and widow of Nathu Mal being entitled to suitable maintenance, ("B," p. 240). It is admitted that mutation of names was effected in accordance with these applications, and the question which we have to decide is whether upon these facts we must infer that there was a disunion of the whole family.

We have already set forth reasons *à priori* and founded on direct evidence in support of our view that despite the proceedings of 1893, there was no separation between Telu Mal and his two young nephews, the present defendants. Obviously the sole intention of all the parties was to separate Tulsi Ram who had for some time past been anxious to start business on his own account, and so far from there being any motive for a general disunion of the family, there was on the contrary every reason why Telu Mal and defendants should continue joint. But it is impossible to say that there was not, in these proceedings, a specification of shares within the meaning of the

decision of their Lordships of the Privy Council in the case of *Balabux v. Rukhmabai* <sup>(1)</sup>, and in addition we have the undoubted fact that the members of the family preferred an application to the Revenue authorities to the effect that the various properties therein specified should henceforth be entered as owned by them in their individual capacities. This application was acted upon and mutation effected in accordance with it. Mr. Dawarka Das was, therefore, fully justified in citing another very recent decision of their Lordships as being in favour of his contention that these proceedings amounted to a disruption of the family, as a whole. The decision in question is that given in the case of *Parbati v. Nau Nihal Singh* <sup>(2)</sup>. It is, of course, unnecessary for us to say that we unreservedly accept the propositions of law enunciated in these two cases. At the same time we are of opinion that the present case is upon its facts clearly distinguishable from the cases which were before their Lordships, and we note that in both of the latter cases their Lordships discussed the facts to see if the propositions of law which they laid down would apply. In the former case, it is expressly stated that it would be open to the parties to show that after the virtual separation which was effected by a specification of shares among the members of a joint Hindu family, there was among certain members an agreement to remain united or to re-unite. In the latter case, while holding that an application to the Revenue authorities to record shares in severalty could not be looked upon as a mere paper and nominal transaction, their Lordships proceeded to point out that subsequent events showed conclusively that the application was intended in that case to be a real division of the property. They say, after discarding the oral evidence as worthless,—“But of the numerous documents given in evidence many are absolutely inconsistent with the continuance of the family as a joint Hindu family owning the family property jointly; none are inconsistent with the partition, in interest and right, of that property in the manner indicated in the petition; and some are inexplicable on any other assumption.” And their Lordships lay great stress upon one fact which in their opinion proved beyond doubt that a partition had taken place. They say, “if there be one thing more than any other inconsistent with the existence of a joint Hindu family, it is that the eldest male and manager of the family, should treat one member as the owner of his share of the entire property, and account with that member for the income of the property upon that basis. Yet

<sup>(1)</sup> 1903) *I. L. R.* 30, Cal. 725 *P. C.*<sup>(2)</sup> (1909) *I. L. R.* 31 *ALL.* 412.



“the very first business transaction which takes place between Dalip Singh and Mussammat Rani after the presentation of the petition is conducted on those lines.” From those quotations it is clear that their Lordships did not intend to lay down as a hard and fast rule that the mere specification of shares in a document, or the mere application to the Revenue authorities to effect mutation of names in favour of the various members of a joint Hindu family, *per se* debarred the parties from asserting that despite such proceedings there had in actual fact been no separation between certain members of the family. On the contrary, their Lordships held that it is open to the latter to prove that there was no separation between themselves and any other member of the family. The question then before us is whether upon the facts of the present case there was a separation between Telu Mal and his nephews, the defendants. As we have had occasion to remark before, there was no reason why they should separate. On the contrary, Telu Mal, who was averse even to the separation of Tulsi Ram, would have been the very last person to agree to the defendants also leaving the firm at a time when he was old and blind and his son was an imbecile. But apart from that fact, we have defendants themselves in their final application to the Assistant Collector (on the 1st May 1893) stating distinctly that their names and the name of Telu Mal should be entered as joint owners of the properties that fell to their respective shares, (“B” p. 240). Tulsi Ram again admits that no partition money “was credited to the *khata* of Kishore Chand and Kanshi Ram or of Telu Mal-Nathu Mal,” and that the only entry made at the time was with regard to his own share (“A,” p. 94, ll. 27-35). He admits that he received his own full share, however, (“A.” p. 48 l. 28). Then again, Mussammat Sahib Devi, the widow of Telu Mal, who is a witness, unquestionably partial to plaintiff, states that when Tulsi Ram was separated off in 1893, the defendants remained joint with Telu Mal, and this too despite her entreaties to the contrary (p. 107, “A” l. 2). Nor is there wanting documentary evidence in support of defendants’ contention. From the account books it will appear that while the expenses of Tulsi Ram no longer appear in the *kharch khata* after 1893, the expenses of defendants and their families continue to be so debited as before (see Kishore Chaud’s evidence, pp. 34 (l. 42, and 35). Again, according to the application for partition, dated 7th March 1893, the land in *mausa* Rukna Mangla fell to the share of defendants (“B,” p. 110, l. 4). But when this land was sold in April 1894, we find that the vendors

are Telu Mal, Kishore Chand and Kanshi Ram ("B," p. 245). Obviously, if there had been a real separation between Telu Mal and the defendants in 1893, there would have been no necessity for including the name of Telu Mal as one of the vendors of this property, nor would the sale proceeds have been credited to the *kharch khata* of the firm as in point of fact they were (Kishore Chand's evidence, p. 75, "A," ll. 27-31, see also ll. 32-35). Then again, if a disruption of the family as a whole had occurred in 1893, we fail to see why defendants should have defrayed all the expenses incurred in respect of the death of Telu Mal in 1897 (a large sum of Rs. 8,782 were spent on this occasion—"A" p. 33, l. 21 *et seq.*) and of Nathu Mal. On the latter occasion defendants spent a sum of Rs. 1,951 and towards this sum Tulsi Ram and his father Narain Das contributed only Rs. 11 *bataur pagri* (p. 33, "A," l. 33). Nor again if the family had disunited as a whole, is there any explanation offered for the fact that it was Kishore Chand and not Tulsi Ram who performed the important ceremony of the *kirya karam*.

Again, we find that in various mutation proceedings that occurred subsequently to 1893, the shares of Telu Mal and defendants were stated differently on different occasions. Sometimes the shares were described as being equal and sometimes Telu Mal was stated to have a two-thirds or a one-third share (Kishore Chand, "A," p. 41, l. 31). Lastly, certain lands were purchased after 1893, in the names of the defendants, but the income of all the villages was eventually transferred to the *khata* of the shop (Kishore Chand, p. 27, "A," l. 7). All these facts are inconsistent with the theory that there was a separation in actual fact between Telu Mal and the defendants in 1893, when Tulsi Ram was admittedly partitioned off. But irrespective of these facts, it is open to argument whether in the peculiar circumstances of the case, the proceedings of 1893 could in any event be regarded as a disruption of the family. It is admitted that as Mulan Mal died in Sambat 1932, it was legally impossible for Tulsi Ram to rejoin the family in the strict sense, for, as laid down by their Lordships of the Privy Council, "a re-union in estate-property so called can only take place between persons who were parties to the original partition," (*Balabux v. Rukhmabai*)<sup>(1)</sup>. Assuming, therefore, that there was in Sambat 1917 a partition between Telu Mal, Mulan Mal and Narain Das, we must necessarily hold that in Sambat 1933 (after Mulan

(1) (1903) I. L. R. 30, Cal. 725 (734) P. C.

Mal's death) there could not be a re-union in law between Telu Mal, defendants and Tulsi Ram. This being so, it follows that the so-called separation of Tulsi Ram in 1893 could not, in itself, affect the position of the other members of the united family. In answer to all these facts against his theory that in 1893 there was a separation of all the members of the family, Mr. Dawarka Das refers to (1) the fact that in 1891 separate accounts had been started in the names of the various members of the family, and that the accounts were carried on even after the departure of Tulsi Ram; (2) suits being instituted in the names of various members of the family; and (3) the fact that Telu Mal, in a certain lease executed after 1893, stood surety to defendants for payment of rent by a certain lessee of the name of Kamal-ud-din.

In our opinion these facts are not inconsistent with defendants' contention that there was in 1893 no real separation between them and Telu Mal. As we have already observed, the separate *khatas* which were started in 1891 were opened with the object of eventually dividing off Tulsi Ram. Kishore Chand gives this explanation ("A," p. 24, l. 13) and his evidence upon the point has not been contradicted, and he also explains (again without contradiction) that they were continued after the separation of Tulsi Ram, in order to check the extravagance of the ladies of the family, (p. 28, "A," l. 6). Not only is he not contradicted upon these points, but his evidence is practically corroborated by the statement of Tulsi Ram himself (p. 94, "A," l. 25). As regards the institution of suits in the name of Telu Mal, the District Judge has very rightly pointed out that this fact can count for nothing. In the first place, it is, or was, quite usual for the managing member of the family to sue in his own name for debts due to the firm, and in the second place, we find that on several occasions even the *gomashta* of the firm figured as the plaintiff on certain occasions (see, for example, pp. 88, 89, 90 of Book "B"). This fact, therefore, can carry no weight. There is greater force in the third argument and *primâ facie* it would seem to be incongruous that Telu Mal, who was one of the owners of the property, should stand surety to his nephews, the other co-owners, for payment of the rent from the lessee of part of the joint property. But it is obvious from the statements of Kishore Chand in that case ("B," p. 131) that he had very little knowledge of the history of the family or of the facts of the case. He states first of all that the proprietors in the firm (who were entitled to the rent) were Telu Mal, himself and his



brother and that Natu Mal had no concern whatever therein, even after the death of Telu Mal. This was in direct contradiction with what he had stated to the Revenue authorities on the 1st May 1893. But he continues :—"The shop was joint, " Telu Mal was a surety for the payment of the said rent. But " he was only a nominal surety. Telu Mal had undoubtedly a " right in the mortgage money and rent, by virtue of the shop " being joint. Telu Mal got his name entered merely for the " sake of Kamal-ud-din (the lessee)." We do not think any reliance can be placed upon this piece of evidence. It would seem that Telu Mal was anxious to get a lease in favour of his friend Kamal-ud-din and that he went out of his way to stand surety for his friend. In his life time Telu Mal's wish was apparently law to the members of his household and it was not for Kishore Chand and Kanchi Ram to gainsay him when he wanted to carry out any particular object. In the case with which we are now dealing, Kishore Chand confessedly saw the difficulty of the position and frankly admitted it. Telu Mal was, as he says, one of the owners of the property and yet Telu Mal had in his wisdom thought fit to stand surety for the payment of the rent, Kishore Chand, like a wise man, leaves the matter at that. He cannot explain satisfactorily the whims of the old man, but he certainly can and does, say that the latter was joint owner in the property. Here again we cannot find that there is good and definite evidence inconsistent with the theory that no disruption of the family took place in 1893 when Tulsi Ram, a stranger, was given a *bonus* and allowed to leave the family business.

Our conclusions, therefore, upon this point are in full accord with those of the District Judge, and we agree with him that the family was in all respects joint in the first instance; that the separation of Narain Das in *Sambat* 1917 did not affect the other members of the family; that the latter (Telu Mal, Mulan Mal and their mother) remained joint during their lives; that the proceedings of *Sambat* 1933, when Tulsi Ram was introduced as a manager of the business, of *Sambat* 1941, when 'shares' were allotted to the parties, and of *Sambat* 1950, when Tulsi Ram was given his 'share' and allowed to set up in business for himself did not effect a partition among the really joint members of the family. The latter continued joint in all particulars up to the date of Nathu Mal's death in 1900 A.D. Upon this view of the facts we need say but little with regard to issues 5 and 6. We agree with the District Judge that some sort of "arrangement" was arrived at in 1893 between

Telu Mal and the defendants, and upon this point we see no reason to distrust the evidence of Kishore Chand, corroborated as it is by the admissions made on the 10th May 1893 by Tulsī Ram and by the statements made on the 1st May 1893 by Telu Mal and the defendants to our minds all that this 'arrangement' proves is that at that time the defendants were not aware of the true facts of the case. They were at the time clearly labouring under the misapprehension that the property belonging to the shop was the acquired property of Telu Mal as we have endeavoured to show, this was an error on their part. But it is unnecessary for us to say much in regard to this aspect of the case. If the property was in reality the joint property of the family, it is obvious that Telu Mal had no right to make any disposition of it to the prejudice of his son, Nathu Mal. But if it is joint property, then plaintiff, the widow of Nathu Mal, has admittedly no right to claim the share of her deceased husband, and under the principles of Hindu Law, defendants, who were joint with Nathu Mal, would alone be his heirs.

On the other hand, if the property was the self-acquired property of Telu Mal, it is equally clear that he had plenary powers of disposition with regard to it, (see the decision of their Lordships of the P. C. in *Balwant Singh v. Rani Kishori*, (1)). In the latter event his wishes as to the disposition of the property, expressed on the 1st May 1893 before the Revenue authorities, must be given effect to. In our opinion the property (though it owed its present existence to the genius of Telu Mal) was the joint property of the family and accordingly Telu Mal had no power to dispose of it as he purported to do. We have already pointed out that Telu Mal had for some time past been posing as the owner of the whole property, and we have shown that he was enabled to take up this position, by reason of the fact that there was no one interested and acquainted with the facts to gainsay him. Narain Das and Tulsī Ram obviously would not contradict his assertions, for had they disclosed the truth, defendants would have been able to challenge the validity of the gift made to Tulsī Ram. Apart from them, there was no one alive who would be likely to enlighten the minds of the defendants. It is therefore, not surprising that the latter accepted the arrangement made by Telu Mal, and in the circumstances it cannot be used as an argument against them that having accepted this arrangement, they are estopped from

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(1) (1898) I. L. R. 20 All. 267 P. C.

asserting that the property was really joint. But even if they are estopped from raising that plea, plaintiffs claim must fail, as in that event they are entitled to rely on the facts as alleged by her and to contend that if the property was in truth the acquired property of Telu Mal, the disposition of it made by him in 1893 must be carried into effect. Defendants, however, have from the outset of this case maintained that the real facts are that the property was joint and it is only in the event of this contention being found against them that they set up the alternative plea.

We now come to the question whether the plaintiff's right to her husband's share in the property (whether that property be found to be joint family property or not) has not already been adjudicated upon in her favour. Plaintiff contends that there has already been litigation between defendants and herself as to whether she is or is not the heir to her husband's share in the 'shop' property, and she maintains that in that litigation this question was directly and substantially in issue and that upon it the courts have given a final decision in her favour. This plea of *res-judicata*, as the District Judge remarks in his Judgment ("A" p. 126), was not put into issue formally, but it was fully argued before him at the close of the case. He decided on this point against the plaintiff, but we are not able to agree with him. Plaintiff relies upon two previous cases in support of her plea. In the first case, *Kishore Chand v. Ude Singh* ("B," pages 114, 130, 137) the claim was for a sum of about Rs. 17,000. The suit was instituted in 1897 by Telu Mal, Kishore Chand and Kanshi Ram, but Telu Mal died shortly after its institution. Thereupon Nathu Mal applied, through the other plaintiffs, to be brought on the record as co-plaintiff in the place of his deceased father. The District Judge held (by his order dated 3rd November 1897) that Nathu Mal could not be brought on the record until he had obtained "a succession-certificate." Nathu Mal also died *pendente lite* and the final order of the District Judge (dated 29th November 1901) was that "Mussammatt Nihal Devi's name be substituted for her deceased husband, Nathu Mal." Plaintiff relies upon this order as having once and for all determined her right to be recognised as heir to her husband in respect of any property to which he might be entitled. We cannot accept this contention. The order was made under Section 367 of the Civil Procedure Code of 1882 (o. 22, r. 5 of the present Code) and in making it the District Judge had



not to decide who was heir of the deceased, but who should be admitted to be his legal representative for the purpose of prosecuting that suit in his place, (*Balabai v. Ganesh*,) <sup>(1)</sup>. In a case of this kind the appointing of a legal representative for such purpose does not determine any issue properly raised such for instance as, in a partition suit, the vital issue whether the deceased plaintiff was joint or separate from the rest of the family, (*Parsotam Rao v. Janki Bai*,) <sup>(2)</sup>. In the present case it would be absurd to hold that the order allowing Mussammatt Nihal Devi to represent her late husband as a co-plaintiff in the suit (an order passed in a summary manner) amounted to a final and conclusive adjudication, as between her and the persons who were co-plaintiffs with her, as to her right to be regarded as the heir to whatever property her husband may have possessed in the shop property. Mr. Dawkara Das saw the absurdity of this contention and very rightly laid no great stress upon the proceedings in the case under consideration.

But the other case to which reference was made stands in our opinion upon a different footing. In May 1903, after Mussammatt Nihal Devi had obtained a succession-certificate with respect to the property of her late husband, Kishore Chand and Kanshi Ram brought a suit against Lachhu Mal and others to recover a sum of Rs. 5,405 which they alleged to be due to themselves upon a balance struck in their favour by the principal defendant, ("B," pages 250, 251). In answer to this claim, Lachhu Mal pleaded that the debt was due not to the plaintiff but to the firm of Telu Mal—Nathu Mal; that the plaintiff Kishore Chand, and Kanshi Ram had fraudulently induced him to sign the balance as representing a debt to them alone, and that the widow of Nathu Mal had obtained a certificate for the collection of debts due to her husband and that this particular debt was one included in that certificate, she being entitled (in virtue of the said certificate) to claim two-thirds of it. Lachhu Mal, it is to be observed, did not deny the debt. He admitted that it was due, and the sole question between him and plaintiff was whether or not the latter could claim it without joining Musammatt Nihal Devi as co-plaintiff. Kishore Chand and Kanshi Ram on the other hand, contended that it was a debt due to them personally and that Mussammatt Nihal Devi (as representative of Nathu Mal) had no right to any part of it. Thereupon Mussammatt Nihal Devi applied to be made a co-

(<sup>1</sup>) (1903) I. L. R. 27 Bom. 162

(<sup>2</sup>) (1906) I. L. R. 28 All. 109

plaintiff in the case and after hearing arguments, the District Judge took action under section 32 of the Civil Procedure Code of 1882 and directed that she should be made a plaintiff. This was done and thereafter the following issues were drawn by the Court :—“(1) Was the balance struck by the defendant—“voluntarily or after understanding the accounts”? *O. P.* on plaintiffs.

“(2) Was the defendant subjected to any coercion in striking the balance in suit?” *O. P.* on defendant.

Now it is clear from these issues, read with the pleadings, that the sole point at issue between the original plaintiff in the case and the defendant Lachhu Mal, was whether the former could alone sue for the recovery of the debt or whether it was not a debt due to the firm. Defendant had admitted that he owed the money and his sole defence was that the debt was due to the firm and that he had been induced by fraud and coercion to sign the balance in favour of Kishore Chand and Kanshi Ram. The pleader for the latter persons realised this point and saw that the only question in the case, if defendant proved his contention, would be as to the share (if any) which Mussammat Nihal Devi would be entitled to as the heir of her late husband. He accordingly suggested a further issue to the following effect :—“What share is Mussammat Nihal Devi entitled to in “the amount claimed”? The Court adopted this issue and the case went to trial accordingly.

Obviously upon these issues and pleadings it became necessary for the Court to decide whether (1) the debt was due only to plaintiffs or to the shop of Telu Mal-Nathu Mal: and (2) if due to the shop of Telu Mal-Nathu Mal, whether Mussammat Nihal Devi was entitled to claim part thereof, that part being her husband's share in the firm's property. It was held by the District Judge that the debt was due to the shop and that Mussammat Nihal Devi was entitled to the share therein which her husband would have had, had he been alive. From this decree the present defendants, preferred an appeal to this court and upon this appeal the learned Judge before whom it came, passed the following order :—“This is a first appeal “involving a considerable sum, but the case appears to be a “perfectly clear one, and the respondent” (Mussammat Nihal Devi) “is clearly entitled to the share of her husband decreed “to her. She obtained a succession-certificate to collect this very “share of this very debt and the present appellants produced “no proof that the debt was one separately due to them, and

“ their previous admissions were fatal to their case. I see no reason to doubt the correctness of the decision of the lower Court and I reject the appeal *in limine*.” (“ B,” page 142.) This decision must be taken to have determined once and for all that Mussammat Nihal Devi was entitled to a share in all properties belonging to the firm of Telu Mal-Nathu Mal and that she stood, for all intents and purposes, in the shoes of her late husband, Nathu Mal. It was only on the ground that the debt was due to the firm and that she was the representative of a late partner in it that she obtained a decree for a share in the money, and if in respect of part of the property belonging to the said firm she was able to succeed in securing her share, it must necessarily follow that she is equally entitled to a similar share in the rest of the property belonging to that firm. Defendants admit that the whole of the property now in dispute belonged to the firm of Telu Mal-Nathu Mal and as a result plaintiff (apart from the question of limitation) would be entitled upon the basis of the decision in Lachhu Mal's case to claim Nathu Mal's share in all that property. Mr. Kirkpatrick contends that the decision in Lachhu Mal's case does not amount to *res-judicata* for the purposes of the present case, for the following reasons :—

1. The learned counsel argues, that in that case it was not necessary to decide whether Mussammat Nihal Devi had or had not a right to claim a share in the debt. He admits that a question may be *res-judicata* as between co-defendants or even as between co-plaintiffs, but he maintains that in order that it should be so, there must be active opposition between the parties, who are arrayed on the same side, and that the decision of the point at issue between them should be material for the determination of the case so far as the other party (the defendant in this case) is concerned, (*Ram Chandra Narayan v. Narayan Mohader* <sup>(1)</sup> *Nehal Singh v. Ohanda Singh* <sup>(2)</sup> ; *Thakur Das v. Mussammat Manna* <sup>(3)</sup>).

2. He also relies upon the ruling of the Full Bench in *Shamas Din v. Ghulum Kadir* <sup>(4)</sup> to the effect that “ the true test of the competency of the court which decided the former suit or issue is not merely the jurisdictional powers of the original court in which the previous suit was instituted but the jurisdiction of that court viewed in

<sup>(1)</sup> (1887) I. L. R. XI Bom. 216 (219).  
<sup>(2)</sup> 140 P. R. 1890.

<sup>(3)</sup> 77 P. R. 1894.  
<sup>(4)</sup> 20 P. R. 1891 F. B.



“in connection with the course of appeal allowed in that particular case and the degree of finality attaching to the decisions of each of the Courts, original and appellate, which may be called upon to exercise jurisdiction in the case.” The learned counsel argues that the amount involved in Lachhu Mal's case was only Rs. 5400 whereas the value of the present suit is about Rs. 1,60,000, and his contention is that the decision in the former case cannot upon the F. B. ruling, be regarded as *res judicata* because in the case before us there is a right of appeal to the Judicial Committee, whereas no such right existed in the earlier case.

We have given very careful consideration to these arguments but we are unable to accept them.

As regards the first point, it is clear that the one and only point at issue between all parties was whether the debt was due to Kishore Chand and Kanshi Ram personally or to the shop as represented by them and Nathu Mal's widow. Lachhu Mal frankly admitted that he owed the debt and to all intents and purposes his plea resulted in an inter-pleader suit in which however he was an interested party. Mussammat Nihal Devi had obtained a succession certificate and in this certificate the debt in question was included. He had on the other hand signed a balance in favour of Kishore Chand and Kanshi Ram and it was obviously most important for him to get the decision of the Court as to the person or persons to whom he was to pay the debt. He was no doubt, not further interested in the matter and it was immaterial to him whether Mussammat Nihal Devi was entitled to one half or to two-thirds of the money. But it was vitally important to him to know whether he was to pay the money to Kishore Chand and Kanshi Ram alone or to the firm. The question was equally important to the then plaintiffs *inter se*, who, though arrayed on the same side, were in reality hostile to each other. The question there is whether the debt was due to Kishore Chand and Kanshi Ram personally or whether it was one due to the firm of Telu Mal—Nathu Mal, and in the latter event, whether Mussammat Nihal Devi could claim a share in it as being the heir of Nathu Mal, affected all the parties. If it was due to Kishore Chand and Kanshi Ram, then defendant would have had to pay them the full amount and he and Mussammat Nihal Devi would in all probability have had to pay the costs between them. If it was due to the firm, the money could be claimed only by such persons as actually represented that firm, and the question whether even in that event

Mussammat Nihal Devi was entitled to claim a share, was one in which all parties were interested. In point of fact upon the plaint the Court ought to have confined itself to the simple question whether or not the money was due to Kishore Chand and Kanshi Ram personally, and if it found in the negative, the suit should have been dismissed. But the parties themselves insisted on the Court going into the other questions and it was the pleader for Kishore Chand and Kanshi Ram who expressly asked the Court to frame the extra issue in the case. In the circumstances, the Court having all the parties before it was perforce compelled to decide the respective rights of the parties and in this decision, they were one and all materially interested. In this connection we might observe that on their appeal to this Court, Kishore Chand and Kanshi Ram made Mussammat Nihal Devi the sole respondent, thus showing that the real dispute in the case was between that lady and themselves. We might here note that the District Judge was of opinion that as the parties were arrayed on the same side, the present defendants had no right of appeal as against the present plaintiff in that case. But this view is clearly erroneous and Mr. Kirkpatrick admitted that the learned Judge was wrong in his law. The second point to which we have referred above is not without difficulty. In connection with it we have to consider, in the first place, whether the question must be decided with reference to the Civil Procedure Code of 1882 or that now in force. In the former case we must, of course, follow the ruling of the F. B. in *Shamas Din v. Ghulam Kadir* (1) but if the present Code is applicable, it is clear that the decision of the F. B. is no longer law, (See Section 11, Explanation II).\* A good deal of argument was addressed to us upon this point and Mr. Dawarka Das, in support of his contention that the present Code must be held to be applicable so far as the appeal before this Court was concerned, argued that the rule of *res judicata* was merely one of procedure, and that as statutes regulating procedure are retrospective, the provisions of the present Code must be held to apply when we have to consider whether this question of *res judicata* is or is not to govern the case before us. There is unquestionably force in this argument, and it is not without hesitation that we have come to the conclusion that it must be over-ruled. As a general proposition it may safely be laid down that the procedure clauses of

(1) 20 P. R., 1891, F. B.

\*NOTE BY EDITOR.—The new Code of Civil Procedure came into force on the 1st January 1909, this suit was instituted on the 21st April 1906, and the appeal to the Chief Court was filed on the 21st May 1907, and decided on the 28th February 1910.

an Act must, as such, be held, upon the weight of authority, to carry retrospective effect. But we must at the same time not lose sight of the provisions of the General Clauses Act (X of 1897). Section 6 of that Act expressly enacts that "when any Act of the Governor General in Council . . . made after the commencement of this Act, repeals any enactment hitherto made . . . unless a different intention appears, the repeal shall not:—

"(c) Affect any right, privilege, obligation or liability accrued or incurred under any enactment so repealed. . . ."

Now we may take it as settled law for this Province, that, in virtue of the Full Bench ruling, the defendants in this case had under the provisions of the Code of 1882 the right to claim a decision from the Court that the rule of *res judicata* would not be applied to their prejudice unless the decision of the Court in the previous litigation was given in a suit in which the course of appeal was similar to that in the present case. It seems to us that this was a substantive and very real right, and inasmuch as the present proceedings in the lower Court terminated two years before the Code of 1882 was repealed, it is obvious that in that Court their plea in answer to the plaintiff's contention that the question at issue was *res judicata* must (if the Full Bench ruling were otherwise applicable) have been upheld. If, in other words, the Code of 1882 was still in force, defendants had the right to insist upon the present case being tried and decided without reference to any prior decision of the Courts, unless, of course, the conditions laid down by the Full Bench were found to apply to the present case. In our opinion sub-clause (c) of section 6 of the General Clauses Act of 1897, was intended to cover cases of this kind, and we accordingly hold that the question now before us must be decided with reference to the ruling of the Full Bench in 1891. The next question then is whether the course of appeal in *Lachhu Mal's* case was the same as the course of appeal in the present case. Admittedly in both cases there was a first and direct appeal from the Court of first instance to this Court, but it is argued that while in the present case there is a further right of appeal to the Judicial Committee, the value of the subject-matter of the suit being upwards of Rs. 10,000 and substantial questions of law are involved, there was no such right of appeal to that tribunal in the earlier case, in which the subject-matter of the suit was of the value merely of Rs. 5,000. We have given this contention our best consideration and while we fully appreciate Mr. Kirkpatrick's arguments *per contra*, we have come to the



conclusion that the rule enunciated by the Full Bench is applicable only to the ordinary Courts established in this country. It seems to us that the principle cannot be carried further and applied to an extraordinary tribunal such as that of the Judicial Committee. Under the provisions of sections 595 and 596 of the Civil Procedure Code, 1882, "an appeal" (it is enacted) "shall lie to Her Majesty in Council in the cases specified, "but it is expressly provided in the former section that this "right is given subject to such rules as may from time to time "be made by Her Majesty in Council regarding appeals from the "Courts of British India." Furthermore, section 616 of the Code contained one other proviso to the effect that, "nothing "herein contained shall be understood (a) to bar the full and "unqualified exercise of Her Majesty's pleasure in receiving "or rejecting appeals to Her Majesty in Council, or otherwise "howsoever, or (b) to interfere with any rules made by the "Judicial Committee of the Privy Council and for the time being "in force for the presentation of appeals to Her Majesty in "Council or their conduct before the said Judicial Committee." As a rule of practice their Lordships do, no doubt, give effect to the provisions of section 596 of the Code and in general refuse to entertain an appeal from the decree of a High Court or any other Court in British India, when the subject-matter in suit is below the value of Rs. 10,000—(*Mohan Lal v. Debee Das*, (1). But the provisions of the Civil Procedure do not in any way bind their Lordships, (*Lachmeeput Singh v. Khoobunnissa*, (2); nor do they (as is clear from section 616) limit the undoubted prerogative of the Crown to admit an appeal from any decree of any Court in this country, and to refer it for report or recommendation to the Judicial Committee. Reading section 616 with section 596 we are of opinion that in no case can it be strictly affirmed that an appeal lies *of right*, to His Majesty in Council, even in those suits in which the terms and conditions of section 596 are complied with. In the ordinary course an appeal in such suits will doubtless be entertained by the Judicial Committee, but as is expressly enacted in section 616, the provisions of section 596 in no wise bar "the full and unqualified exercise of His Majesty's "pleasure in receiving or rejecting" such appeals, and we take it that it is competent to His Majesty to reject any appeal *in limine*, quite irrespective of the value of the subject-matter of the suit. In other words, in no case can it be predicated that

(1) (1861) 8 M. I. A. 193.

(2) (11870) 14 W. R. 280.

there is an absolute and unqualified right of appeal to His Majesty in Council in the sense that His Majesty is *bound by law* to entertain the appeal and to refer it to the Judicial Committee for report and recommendation. On the other hand, a right of appeal when given by law from the decree or order of one of the ordinary Courts of this country to a superior ordinary Court is in the truest sense a *right* of appeal, and it is not open to the superior Court to decline to entertain the appeal. For these reasons we are of opinion that the Full Bench decision upon which Mr. Kirkpatrick relies, has no applicability except with reference to the ordinary Courts of British India and to the course of appeal from one to another of those Courts. The result is that in our opinion the decision in *Lachhu Mal's* case governs the question of the right of the plaintiff to succeed as heir to her late husband, to the property now in dispute, and this, too, in despite of the fact that upon our findings in the present case, she would clearly have no *locus standi* as such heir, the property being the joint property of the family. But plaintiff must nevertheless fail in her present suit as the first question with which we have to deal is whether upon the allegations in her plaint, her claim is within time. Upon this question we have had to decide against her and obviously the limitation point is the one which has to be determined first and foremost. However good her claim may be otherwise, it must necessarily fail if it has been preferred out of time.

Upon the next question—whether part of the claim is beyond the cognizance of the Civil Courts inasmuch as it involves the assertion of the right of one co-sharer in an estate or holding to a share of the profits thereof or for a settlement of accounts—we need say but little. Mr. Kirkpatrick frankly admitted that there was here no question as to the applicability of section 77 (3) (k) of Act XVI of 1887, and that the suit must, upon the allegations in the plaint, be regarded merely as a general claim by the representative of a deceased partner for an account of the partnership. The learned counsel stated that he was not prepared to support the objection and he agreed that Mr. Dawarka Das' contention was correct that the profits from the agricultural land were received jointly and duly credited in the books of the *Dukan*. Plaintiff has, we believe, preferred a separate claim in the Revenue Courts for her share of the profits of the land for the three years preceding the date of institution of the present suit, because those profits were not credited in the account books. With that claim we have of

course no concern, but there can we think be no doubt that the jurisdiction of the Civil Courts is not ousted in respect of that portion of the present claim which relates to the earlier profits from that land. These profits were realized and were entered in the books as part and parcel of the assets of the *Dukan*, and plaintiff is fully entitled to say that once they were so entered, they became monies had and received by defendants to her use. We hold, therefore, that the eighth issue must be decided in favour of plaintiff, *Karim Bakhsh v. Mussammat Amar Deri* (1). There remains only the 12th issue for consideration, i. e. "Whether the property detailed in list C constituted *waqf*, and if so is plaintiff entitled to the "management." We might observe in passing that the expression *waqf* is not very appropriate to a case in which the parties concerned are all Hindus, and that the word *dharmarth* is presumably the right term to use in such a case. This, however, is a minor point. Upon the general question we find ourselves in full accord with the findings of the District Judge. There is no satisfactory evidence to show that Telu Mal (even if he had the right to do so) ever intended to divest himself of the ownership of the *dharmasala*, and as regards the *shivdawara*, everything would seem to point to the conclusion that the control and management was to remain with the family. The District Judge has given good reasons for holding that in no case could plaintiff be regarded as a proper person to manage these two properties. If they are part of the general property of the joint family, her right to a share in them must stand or fall with her claim to a share in the general estate. But if they do not belong to the general estate and if they have been dedicated as *dharmarth*, the power of control and management alone being reserved to the family, we agree with the District Judge that the nephews of the author of the trust would unquestionably be regarded by public opinion as the persons entitled to that control and management in preference to a lady.

The net result of our findings is that the present appeal must fail and we accordingly dismiss it with costs.

28th Feb. 1910.

WILLIAMS, J.—I have but little to add to the very clear analysis of the case contained in my brother Rattigan's judgment, in which I fully concur, but there are two points in respect of which I wish to offer the following additional remarks.



The first is the fact (referred to at pages 68-70 of my brother's judgment) that "in a certain lease executed after 1893 Telu Mal stood surety to defendants for payment of rent by a certain lessee of the name of Kamal-ud-din." It is obvious that such an incident is at first sight wholly incompatible with the theory (which in concurrence with the lower Court we have accepted) that after 1893 Telu Mal and his nephews (the defendants) continued to be joint in family and estate. But the truth of the matter is that we have really very inadequate information about the incident in question. Possibly because the importance of it was not sufficiently realized in the lower Court, no questions were addressed to either of the defendants to elicit how or why Telu Mal should have stood surety for Kamal-ud-din, and the principal information which we possess in regard to the episode is the deposition of Kishore Chand (now defendant) given on the 3rd January 1902 and printed at pages 131-2 of Paper Book "B". That deposition however was given at a time when, as my brother has clearly shown, the defendants were under a total misapprehension as to the circumstances of the family and the manner in which the wealth of the firm had been acquired; and it is a pity therefore that they were never reexamined on the subject—that is in the course of the present litigation—after they had modified their first erroneous impressions. But it is important to notice that although the words, which I have shown above in inverted commas and which I have reproduced from my brother's judgment, correctly set forth the incident as it has been put before us in argument, the actual facts so far as we know them were somewhat different. The heading to the deposition ("B" p. 131) makes it clear that the principal debtor and lessee was not Kamal-ud-din at all, but one Sri Dhar, *brahmin*, and that Kamal-ud-din was himself only a surety. Now this Sri Dhar appeared as a witness in this cause (W. P. 13, Vol. "A." p. 112) and on page 113, line 5 *et seq.*, he throws so much light on the subject of this lease as to make it clear that the defendants acquired this land in 1896, or just one year before Telu Mal died and at a time when the management of the business was practically speaking exclusively in their hands, and that the rights acquired were not those of full proprietors but those of mortgagees, so that the transaction was apparently one which, under the express terms of the arrangement of 1893 regarding the business of the shop and mortgage business, should have been treated as joint. Consequently the security given by Telu Mal must have been a mere form from whatever

point of view it is regarded. It is not a very profitable business to speculate on a matter which is so much wrapped in mystery, but a possible explanation may be that Sri Dhar was an old servant of Telu Mal's and had worked for him and lived with him from *Sambat* 1915 to *Sambat* 1948; that he was anxious to lease this land, but the defendants were not anxious to take him as a tenant, it will be noticed that they eventually put him into Court for a not very large amount of rent, so that they cannot have had a very particular regard for an old servant of the firm; and that Telu Mal terminated the business in Sri Dhar's favour by the dramatic, but perfectly futile, expedient of giving security for him. It is perhaps a little unfortunate that the copy of the actual security bond which, although curiously misdescribed, is evidently the document referred to as No. 15 on p. 121 of Vol. "A", was rejected as unproved by the learned District Judge, (p. 122 l. 14 *idem*), although we do not question the propriety of his decision.

The other point is as to the question of *res judicata*, which has been discussed at page 72 *et seq* of my brother's judgment and as regards which I concur in thinking that the Full Bench ruling, *Shamas Din v. Ghulam Qadir* <sup>(1)</sup>, can only be held to refer to the course of appeal in the ordinary Courts established in this country, of which the High Court is declared (Act X of 1897, section 3, sub-section (24)) to be the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates.

To carry the principle further would it seems to me render it difficult to apply the doctrine of *res judicata* with certainty in any particular case. For instance, a decree may be appealable to His Majesty in Council as of right however small the actual value, provided that it indirectly involves some claim or question to or respecting property of, the value of Rs. 10,000 or upwards. *Aranda Chandra Bose v. Broughton* <sup>(2)</sup> and *Mussamat Aliman v. Mussamat Hasiba*. <sup>(3)</sup> And on the other hand, a decree in a suit of whatever value will not be appealable to the King in Council, provided that there is a concurrent finding of two Courts on matters of fact and no substantial question of law is involved. A full consideration of this question however would involve an examination of certain points of considerable delicacy and constitutional importance, as for instance, whether the right to appeal to His Majesty in Council is in any

(1) 20 P. R., 1891, F. B.

(2) (1872) 9 B. L. R., 423.

(3) 1 Cal. W. N. LXXXXIII.

essential way different to the general common law right of every subject to petition the Crown for redress of grievances, and whether the statutes III and IV, Will. IV, cap. 41, operate to give a suitor an absolute right to have his appeal admitted in certain circumstances, and to have a hearing at the board, a thing which more exclusively Anglo-Indian legislation has ever since the year 1775 consistently, and almost ostentatiously, disclaimed doing. It is not however necessary to give a decision on the question of *res judicata* for the determination of the appeal presently under consideration, and I think it will be more convenient and more respectful to leave such matters for the decision of their Lordships, should the necessity arise.

*Appeal dismissed.*

**No. 98.**

*Before Hon. Mr. Justice Shah Din.*

FATTA AND OTHERS—(PLAINTIFFS)—APPELLANTS,

*Versus*

JIWAN AND OTHERS -(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1034 of 1908.

*Custom—Succession—Collateral succession of widow—Muhammadan Jats of tahsil Nakodar, district Jullundur.*

*Held* that by custom among Muhammadan Jats of tahsil Nakodar, district Jullundur, a widow succeeds collaterally to the property to which her husband would have succeeded, if alive.

*Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated the 1st July, 1908 Morrison, for appellants.*

Makhan, respondent, in person.

The order of the learned Judge remanding the case was as follows :—

SHAH DIN, J.—It is conceded on both sides that the question of limitation, which arises in this case, turns upon the determination of the question whether Mussammat Phaphan, the widow of Waris, had under the custom applicable to the 'parties' tribe a right to succeed collaterally on the death of Mussammat Jio widow of Paris, so far as the land in suit is concerned. The learned District Judge has stated the same question in the following terms :—

"The question then is whether Mussammat Phaphan had any right to a share in the land left by 'Paris.' If she had, then [plaintiff could not sue during her life-time,] and the suit is

2nd April 1909.



“within time—*Rulia v. Rulia* (1). If she had not, the existence “of Mussammat Phaphan is immaterial, and plaintiffs’ suit is “barred.”

It will be observed that on the question of Mussammat Phaphan’s right of collateral succession which was directly involved in the third issue as framed by the Court of first instance, the *onus probandi* was laid by that Court on the defendant-respondent Jiwan. The latter appears to have produced no evidence with a view to discharge that *onus*, and the plaintiffs therefore did not think it necessary to produce any evidence in rebuttal. The Sub-Judge found in plaintiffs’ favour on the question raised, remarking :—

“In some tribes widows do succeed collaterally, and when “the plaintiffs have always been admitting Mussammat Phaphan’s “right, I think it unreasonable to hold that their right to succeed “opened before Mussammat Phaphan’s death.”

On appeal the Divisional Judge held, following *Mussammat Aso v. Mussammat Tabi* (2), the *onus* of proving the custom of collateral succession on the part of a widow in the position of Mussammat Phaphan, lay on the plaintiffs, and not on the defendant Jiwan, and that as no evidence had been adduced to show that among Muhammadan Jats of Nakodar *tahsil* a custom exists under which widows succeed collaterally, the presence of Mussammat Phaphan cannot be held to have affected the *locus standi* of the plaintiffs to sue in respect of the land left by Mussammat Jio.

Before me Mr. Morrison for the plaintiffs-appellants rightly urges that the Lower Appellate Court having changed the allocation of the burden of proof as regards the question of the widow’s right of collateral succession, should have remanded the case to the First Court with a view to afford the plaintiffs an opportunity to adduce evidence in support of their position, which evidence they had held back because of the imposition of the *onus* by the First Court on the defendant-respondent. This contention has, I think, great force and must prevail.

Furthermore, it is to be observed that the ruling of this Court on which the Lower Appellate Court has relied as regards the matter of *onus*, viz., *Mussammat Aso v. Mussammat Tabi* (2), has to a large extent been neutralized by later decisions, notably *Saidan v. Khemi* (3), *Lahori v. Radho* (4), *Mahan Kaur v. Sundar Das* (5), and that the *onus*, if it lies at all on the plaintiffs, is not

(1) 41 P. R., 1903.

(2) 77 P. R., 1893.

(3) 15 P. R., 1906

(4) 72 P. R., 1906

(5) 40 P. R., 1909.

so heavy as the Lower Appellate Court considers it to be.

The question involved is one of considerable importance and should not have been disposed of in a summary manner as has been done by the Lower Appellate Court. Under Order XLI, rule 25, C. P. Code, I remand to the Lower Appellate Court the following issue for enquiry and report :—" By custom applicable " to Muhammadan Jats of *tahsil* Nakodar, does a widow succeed " collaterally to property to which her husband would have succeeded, if alive ? "

Both parties will be called upon and will be allowed every reasonable opportunity to adduce evidence of all description relevant to the above issue, and if necessary, a Revenue Officer of experience may be deputed to make a thorough local enquiry, which should embrace as many of the Jat villages as possible. The Divisional Judge will favour this Court with a full expression of his own opinion on the result of the inquiry, and is requested to make an early return.

The judgment of the learned Judge after remand was as follows :—

SHAH DIN, J.—A return has now been received to this Court's order of remand, dated the 2nd April 1909. On the issue of custom sent down for trial the learned Divisional Judge has found in the negative, though the *tahsildar* of Nakodar, who was appointed a local commissioner to conduct the enquiry on the spot, has reported that the custom relied upon by the plaintiffs has been proved in their favour.

16th June 1910

In the First Court the parties produced only five witnesses, two being produced by the plaintiffs and three by the defendants. The plaintiffs' witnesses referred to the two mutations which will be discussed presently, while one of the defendants' witnesses cited the judicial precedent of *Mussammat Bao v. Bura* and others, which the learned Divisional Judge has accepted as one of some importance. The *tahsildar* of Nakodar examined no less than 29 witnesses, including two *patwaris*, belonging to the villages of Pattoki Kalan, Pattoki Khurd, Chak Khanna, Gatta Mandi, Kamalpur and Mandhala. All these witnesses, who are Muhammadan Jats of *tahsil* Nakodar, have unanimously deposed in favour of the existence of the custom of widow's collateral succession in their tribe; and their evidence, supported as it is by two mutations in the villages of Mandhala and Parliwal is in my opinion sufficient to shift the *onus* (if the *onus* originally lay upon the plaintiffs) on to the defendants, of proving that among the Muhammadan

Jats of Nakodar *tahsil* a widow does not succeed collaterally to the property of her husband's agnatic relations.

It may be noted in this place that the parties to this suit are Muhammadan Jats of Zira *tahsil* in the district of Ferozepore, but the land in dispute is situated in the Nakodar *tahsil* of the Jullundur District. Though the issue of custom which was sent down for trial, confines the enquiry to Muhammadan Jats of the Nakodar *tahsil*, it seems to have been taken for granted by the parties that the custom prevailing among Muhammadan Jats of both the *tahsils* of Zira and Nakodar as respects widow's succession is identical, and I agree with the learned Divisional Judge in thinking that, for the purposes of the present case, it will be safe to assume, with the parties, that what is the rule of custom in one *tahsil* is also the rule in the other.

The two mutations on the record are entirely in favour of the plaintiffs.

(1) The first mutation is dated the 28th May 1905 and relates to land situate in village Mandhala, *tahsil* Nakodar. This mutation shows that Mussammat Rani, widow of Sattar, succeeded to the share which her husband would have inherited in the property left by Jama, Sattar's brother, on the death of Jama's widow, Mussammat Bhago.

(2) The second mutation is dated the 16th March 1905 and relates to village Parliwal, *tahsil* Zira. According to this mutation, on the death of Shera, his brothers Pira and Godhi and one Mussammat Dani, widow of a fourth brother, succeeded to his land in equal shares.

Both these mutations directly support the plaintiffs' case, and not one mutation has been cited by the defendants, showing the existence of a custom to the contrary. For the defendants reliance was placed before the Divisional Judge on the decision of Sardar Balwant Singh, dated the 28th October 1892, in the case of Mussammat Bao v. Bura and others. In that case the parties were Muhammadan Jats of *tahsil* Zira, Ferozepore District. Mussammat Bao claimed to succeed collaterally to a share in the land left by Mussammat Jio, a widow of an agnate of Mussammat Bao's deceased husband. The *onus* was placed upon the plaintiff of proving her alleged right of collateral succession, and the Court held, in a judgment of a few lines, that she had failed to discharge that *onus*, and accordingly dismissed the suit. This judicial precedent is not of much value. No attempt was made by the Court to order an enquiry into



the question of custom, and the suit was dismissed in a summary manner simply on the ground that the *onus* being on the plaintiff, she had been unable to discharge it.

In the present case a thorough local enquiry, embracing a number of Jat villages in the Nakodar *tahsil*, has been made by a Revenue Officer of experience, and I think that where oral evidence of persons, who are likely to know of the existence of a custom and who are affected by it, is overwhelmingly strong in support of it, it must be accepted as *prima facie* proof of such custom, especially when it is supplemented by valuable documentary evidence in the nature of mutations. The weight of such evidence cannot be neutralized by the mere fact that a summary judicial decision based on no enquiry whatever, negatives the existence of the custom in question.

For the foregoing reasons, I hold it proved in this case that among Muhammadan Jats of *tahsil* Nakodar, a widow succeeds collaterally to the property to which her husband would have succeeded, if alive. Such being the custom which governs the parties to this litigation, it is clear that the plaintiffs had no right to succeed to the property in suit during the life-time of Mu-sammatt Phaphan, and as the latter died only a short time before the institution of the suit, it is clear that the suit is within limitation.

On the merits of the case, I have no hesitation in agreeing with the findings of the First Court, as in my opinion the defendants have failed to prove any acquiescence on the part of the plaintiffs such as would debar them from bringing the present suit. I accept the appeal, and setting aside the decree of the Divisional Judge, decree the plaintiffs claim with costs throughout.

*Appeal allowed.*

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No. 99.

*Before Hon. Mr. Justice Johnstone.*

ROSHAN DIN AND OTHERS —(DEFENDANTS)—PETITIONERS,

*Versus*

KHUDA BAKHSH—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 472 of 1910,

*Pre-emption—Right to sue on the strength of property of which the pre-emptor is owner only during the life of a certain person—Pre-emptor suing for possession of the land as mortgagee—Waiver.*

F. D. the vendor-defendant and one S. his cousin, had a joint holding of which S. sold his half share to K. B. the plaintiff in 1894, and the remaining half share was sold by F. D. to K. A. and others, by a registered deed of sale in 1907, without mentioning any previous encumbrance on the property. On 24th January 1908, K. B. (plaintiff in this case) brought a suit for possession of the same land as a mortgagee under an alleged mortgage of 1887, on the ground that he had been wrongfully dispossessed by the defendant, the vendee. This suit was dismissed on 14th August 1908. While this case was pending, on 28th April 1908, F. D. instituted a suit against S. and K. B. for a declaration that the sale effected by S. in favour of K. B. in 1894 was not binding on him, as the sale was without necessity. The claim was decreed subject to a valid charge of Rs. 50 on the land. The present pre-emption suit was instituted by K. B. on 5th June 1908, while both the above suits were pending. The defence was that no right of pre-emption accrued to plaintiff inasmuch as he was owner only till S.'s death of the property on the strength of which he claimed pre-emption and that plaintiff's suing for the land as mortgagee in the previous suit amounted to acquiescence and waiver and that section 43 of the Civil Procedure Code, 1882, barred the suit. Both the courts below decreed the claim. On revision the Chief Court

*Held*, that plaintiff had a right of pre-emption on the strength of the property of which he was owner till the death of S., and that there was no waiver on his part and that section 43, Civil Procedure Code 1882, had no bearing on the case.

*Petition under section 70 (A and B) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the decree of Rai Sahib Bhagat Narayan Das, Divisional Judge, Hissar Division, dated the 29th November 1909.*

Roshan Din, appellant, in person.

Gokal Chand for respondent.

The judgment of the learned Judge was as follows :—

2nd June 1910.

JOHNSTONE J.—This petition was admitted on grounds 2 and 4 (a) of the petition; i.e., on the contentions that, because plaintiff was merely owner till death of Suba of the property on the strength of which he claimed pre-emption, no right of pre-emption accrued to him; and that plaintiff's suing for the land as mortgagee in a previous suit implies that he acquiesced in the sale and so waived his rights. It is perhaps unfortunate for petitioner that his counsel was unable to appear; but it seems to me on examination of the records and on consideration of the arguments that neither of the above contentions is sound.

The first is a nice point but I think it can be solved in this way. Plaintiff is undoubtedly owner of the property in question now, though on Suba's death he may have to surrender it to another person. That other person certainly cannot sue for pre-emption on the score of owning it, for he is not owner

and may never be; if Suba outlives him, he can never be. In these circumstances surely plaintiff has the right of pre-emption on the strength of this property. If he has not, nobody has.

Then as regards the second point, it seems to me quite clear upon the authorities that there was no waiver on the part of plaintiff. He had not made up his mind whether he would sue for pre-emption or not, and he wanted his security at all events. He therefore sued for possession under his mortgage-deed, a right by no means inconsistent with a claim for pre-emption. He sued for his mortgage rights and he kept the right to sue for pre-emption of the equity of redemption. Not only was there no waiver, but section 43, old Civil Procedure Code, invoked by vendee in the First Court, has no bearing on the case, as the cause of action in the suit for possession as mortgagee is manifestly different from that in the pre-emption suit.

Dismissed with costs.

*Revision rejected.*

### No. 100.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Williams.*  
MUSADI LAL AND OTHERS—(PLAINTIFFS)—APPELLANTS,

*Versus*

BADHAWA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 891 of 1908.

*Indian Limitation Act, XV of 1877, section 5—Appeal—Time taken up with review—Sufficient cause.*

*Held*, that filing a petition for review is not a "sufficient cause" within the meaning of section 5 of the Indian Limitation Act, 1877, for not presenting an appeal within time, unless it is shown that there were reasonable grounds for asking for a review.

*First appeal from the decree of T. P. Ellis, Esquire, District Judge, Delhi, dated 31st January 1908.*

Obedulla, for appellants.

Jangu in person, respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—This appeal is clearly barred by time. The 24th June 1909, decree of the District Judge was passed on the 31st January 1908. On the 12th March 1908 the plaintiffs-appellants applied to the District Judge for review of judgment. Notice was issued, but the application was rejected on the 13th June 1908, and the present appeal was filed in this Court on the 17th July 1908.



Mr. Obedulla for the appellants urges that the period during which the proceedings for review of judgment were pending in the District Judge's Court should be excluded in computing the 90 days allowed by law for an appeal to this Court, inasmuch as the appellants had "sufficient cause" (within the meaning of section 5 of the Limitation Act, 1877) for not presenting the appeal so long as it was uncertain, whether or not he would be successful on his application for review.

There are, no doubt, cases in which it has been held that the pendency of an application for a review of a decree or judgment is a good and sufficient cause for not presenting an appeal within the prescribed period. But in every such case it is incumbent on the appellant who craves indulgence under section 5 of the Limitation Act to show that he had reasonable grounds for asking for a review, *Ashanulla v. The Collector of Dacca* <sup>(1)</sup> cited with approval in *Karm Bakhsh v. Daulat Ram* <sup>(2)</sup>. In the present case of the four grounds upon which the application for review was based, three were mere grounds of appeal, and not grounds for review, and the fourth is utterly false in fact. As, therefore, there were no reasonable grounds for the application for review, we must decline to allow the appellant to exclude the period during which that application was pending in the lower Court, and the result is that the present appeal is barred by limitation. We accordingly dismiss it, but without costs, as respondent (who appeared in person) has incurred none in this Court.

*Appeal dismissed.*

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No. 101.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Williams.*

ALI BAKHSH AND OTHERS—(DEFENDANTS)—  
APPELLANTS,

*Versus*

CHUHAR SINGH AND OTHERS—(PLAINTIFFS)—  
RESPONDENTS.

Civil Appeal No. 92 of 1909.

*Civil Procedure Code, 1908, Order XLIII, rule (1) (u)—Order of remand under section 562, Civil Procedure Code, 1882—Appeal—Punjab Courts Act, XVIII of 1884, section 70 (1) (b)—Revision.*

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<sup>(1)</sup> (1888) I, L. R. 15 Cal. 242.

<sup>(2)</sup> 183 P. R. 1888, F. B.

*Held*, that under Order XLIII, rule (1), clause (u), Civil Procedure Code, 1908, no appeal lies to the Chief Court from the order of the Divisional Judge, remanding a case under section 562 of the Code of Civil Procedure, 1882, in a case where an appeal would not lie from the final decree of the Divisional Judge.

*Held* also, that in the circumstances of the case the Court must decline to interfere with the order of remand under clause (b) of section 70 (1) of the Punjab Courts' Act, 1884.

*Miscellaneous appeal from the order of W. A. Le Rossignol, Esquire, Divisional Judge, Amritsar Division, dated the 6th January 1909.*

Zia-ud-din, for appellants.

Durga Das, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—Mr. Durga Das raises a preliminary objection 2nd June 1909. that no further appeal lies in this case, and after hearing Mr. Zia-ud-din, we are of opinion that the objection must prevail.

The suit is clearly an "unclassed" suit for the purposes of the Punjab Courts Act, inasmuch as the land in dispute does not fall within the definition of "land" as given in the Punjab Tenancy Act, 1887. The value of this land is only Rs. 262-8, and consequently no further appeal would lie in the case from the final decree of the Lower Appellate Court. Such being the case, no appeal lies from the order of the Divisional Judge remanding the case under section 562, Civil Procedure Code of 1882 (Order XLI, rule 23 of the present Code—see Order XLIII, rule 1, clause (u)).

Mr. Zia-ud-din, however, asks us to entertain the memo. of appeal as a petition for revision under section 70 (1), clause (b) of the Punjab Courts Act, inasmuch as there is (according to him) an important question of law involved. Upon the latter point we say nothing, but we are quite clear that it would not be a proper exercise of this Court's revisional power under clause (b) of section 70 (1) of the Act, for it to interfere under that clause, in a case which is still *sub judice* in the lower Courts. No final decree has as yet been passed in the case, and the dispute between the parties has been remanded to the First Court for decision on the merits. When the final order (or rather decree) has been given, it may be open to the present appellant, if he then is still desirous of having the question of law involved in the case, adjudicated upon by this Court, to present a petition under section 70 (1) (b). But

at present any such petition is premature, and upon this ground we must decline to treat the memo. of appeal as a petition for revision.

We accordingly dismiss this appeal with costs.

*Appeal dismissed.*

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**No. 102.**

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Williams.*

MUSSAMMAT RAJJI BAI,—(PLAINTIFF)—APPELLANT,

*Versus*

JESA RAM AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 617 of 1907.

*Hindu Law—Widow's right of residence in one of her husband's houses.*

*Held*, that under Hindu Law, before the widow of a Hindu husband can claim a right of residence in one of her husband's houses, attached in execution of a decree against his representatives, she must prove affirmatively that none of the other houses are suitable for her accommodation.

*Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated the 25th February 1907.*

Sheo Narain, for appellant.

Sukh Dyal, for respondents.

The judgment of the Court was delivered by —

16th June 1909.

RATTIGAN, J.—We find it quite unnecessary to discuss the history of this case which has been narrated to us at some considerable length. The question with which we have to deal is very simple. One Jesa Ram, in execution of a decree which he had obtained against the sons of Raja Ram, as representatives of their deceased father, has attached (among other property) a certain ancestral dwelling house, described in the plaint as "house (b)". The widow of Raja Ram objected to this attachment, and, on her objections being disallowed, she has brought the present suit. The only part of her claim with which we are now concerned, is that which relates to her alleged right to reside in this particular house during her lifetime. The parties are admittedly governed by Hindu Law, and the plaintiff's contention is (1) that the decree obtained by Jesa Ram against her husband's estate was in respect of a debt which, if not immoral, was at all events not a debt incurred by the deceased for the benefit of the family, and that consequently her right of residence cannot be defeated thereby, and (2) that she has the right to reside in this particular house.



We find it unnecessary to deal in any detail with the first question, though we may remark that we are quite satisfied that so far as Jesa Ram at least is concerned, the debt due by Raja Ram was one binding on his sons and *a fortiori*, on his widow. But we need not labour this point, as we are of opinion, that plaintiff's claim must fail upon the second point. It is admitted that Raja Ram left several houses in addition to the one now in dispute, and it is clear that the very utmost that his widow can claim is that she should have a suitable house to reside in during her lifetime. As laid down in *Fakir Chand v. Mussammat Chiranji* <sup>(1)</sup> the property of a Hindu husband may be sold either by him or in execution of a decree against him without the wife's consent, and if the sale is for the purposes of the family, or if sufficient property is reserved for the maintenance of the wife and other members of the family, she cannot object. This principle was accepted by a Division Bench of this Court in a later case—*Mussammat Karam Kour v. Mussammat Kishen Devi* <sup>(2)</sup>—and appears to us to be consonant both with law and equity. In the case before us it is conceded that there are several other houses belonging to the estate of Raja Ram, and in the circumstances, it was, we think, incumbent on the plaintiff to prove that none of the latter houses were suitable for her accommodation, before she could claim a right of residence in the one house attached by the decree-holder. She has made no attempt to prove this, and her claim must, therefore, fail, so far as this particular house is concerned. That she was herself conscious of the weakness of her present claim is obvious from the fact that she made a desperate effort to show that the deceased had actually devised this house to her for her lifetime by an oral will. She entirely failed to substantiate this allegation in the District Judge's Court, and no attempt was made in this Court to rely upon this alleged will. We hold therefore, that plaintiff has failed to prove that the "house (b)" is the only house belonging to her late husband which is suitable for her as a place of residence, and that none of the other dwelling houses belonging to his estate would meet her reasonable requirements, and her suit must, accordingly, be dismissed.

We reject the appeal with costs.

*Appeal dismissed.*

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<sup>(1)</sup> P. R. 84 1888,

<sup>(2)</sup> 39 P. R. 1896,

## No. 103.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr.  
Justice Robertson.

MRS. C. J. DAVIES,—(PLAINTIFF)—PETITIONER.

*Versus*

LIEUT. BROCK SMITH AND OTHERS,—(DEFENDANTS)—  
RESPONDENTS.

Civil Revision No. 2713 of 1908.

*Cantonments (House-Accommodation) Act, II of 1902, section 19—Transfer of Property Act, IV of 1882, section 108 (f)—Indian Contract Act, IX of 1872, section 70—Repairs done by tenant—Cost deducted from rent.*

Where the defendants occupied the plaintiff's house by reason of its having been allotted to their Department by the Cantonment authority under the Cantonments (House-Accommodation) Act 1902, and plaintiff had refused to execute necessary repairs—

*Held*, that the relation between the parties having been settled by a special Act, the application of the general law was ousted and consequently—

- (a) the defendant's remedy was under section 19 *et seq.* of that Act and the rule embodied in section 108 (f) of the Transfer of Property Act did not apply;
- (b) the Civil Courts had no jurisdiction to decide the question of necessity for repairs and their cost under section 70 of the Contract Act, 1872.

*But also*, that a finding by the Cantonment authority under the provisions of section 19, that repairs were necessary and their cost, would enable the Civil Courts to decide whether under section 70 of the Contract Act money paid by the tenant for repairs should or should not, be deducted from the sum claimed for rent due.

*Petition under section 25 of Act IX of 1887 for revision of the order of Major H. Raitt, Judge, Cantonment Small Cause Court, Rawalpindi, dated the 10th August 1908.*

Morrison, for petitioner.

Broadway, for respondents.

The judgment of the Court was delivered by— •

3rd Dec. 1909.

SIR ARTHUR REID, C. J.—The defendants-respondents were occupying the plaintiff-petitioner's house by reason of its having been allotted to their department by the Cantonment authority under the Cantonments (House-Accommodation) Act, II of 1902, and their remedy, on refusal by the petitioner to execute necessary repairs, was under section 19 *et seq.* of that Act. The parties did not stand to one another in the relation of lessor and lessee within the terms of the Transfer of Property Act in such a manner as to make the rule of law embodied in section 108 (f) of that Act applicable, their relations *inter se* having been settled by Act II of 1902, which, being a special Act, ousts the jurisdiction of the general law.

We are unable to hold that the respondents were entitled to abandon their remedy under the House-Accommodation Act and act as if they were lessees under a private contract with the petitioner. They appear, in fact, to have intended to proceed under the House-Accommodation Act and to have abandoned that intention under the impression that the certificate of the local Head of the Military Works Service justified the action subsequently taken by them.

For these reasons we hold that the decree of the Court below, dismissing the suit on the ground that section 108 (f) of the Transfer of Property Act empowered the respondents to execute repairs, cannot be maintained. The question, whether section 70 of the Contract Act is applicable, remains for decision. Here again we find the provisions of the House-Accommodation Act ousting the jurisdiction of the Civil Court to decide the question of the necessity for repairs and the cost of necessary repairs. On action taken by the tenant under section 19 of the House Accommodation Act the Cantonment authority may, by notice, require the owner to repair within fifteen days. The owner may, within fifteen days of service of notice, require that the matter be referred to a committee of arbitration, and failure to repair on a decision of the committee that repairs are necessary, is a condition precedent to the Military Works Service causing the repairs to be executed at the expense of the tenant, who may deduct the cost thereof from the rent or otherwise recover it from the owner. In our opinion these provisions of the Act oust the jurisdiction of the Civil Courts to consider the question whether repairs were necessary and the cost of the necessary repairs. At the same time a finding under the Act that repairs were necessary and that the cost of necessary repairs exceeded or equalled the sum claimed for rent, would be important with reference to the provisions of section 70 of the Contract Act which applies to cases in which there is no specific contract between parties. As remarked above, the Civil Courts cannot decide whether the owner was bound to execute the repairs executed by the tenants, and cannot decide the cost of these repairs, but a finding on these points by the Cantonment authority would enable the Civil Courts to decide whether, under section 70 of the Contract Act, money paid by the tenants for repairs should, or should not be deducted from the sum claimed for rent due.

We set aside the decree of the Court below, which dismissed the suit with costs, and we remand the suit to that Court, which



will postpone further hearing for three months from this date to enable the tenants-defendants, if so advised, to move the Cantonment authority with a view to securing a decision on the points above specified. Should a further postponement be necessary, the defendants are at liberty to move this Court. Costs of this Court will be costs in the cause.

*Revision accepted.*

**No. 104.**

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

DHIAN DAS,—(DEFENDANT)—PETITIONER,

*Versus*

JAGAT RAM,—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 1792 of 1909.

*Civil Procedure Code, 1882, section 539—Collector's sanction not open to revision by Chief Court.*

*Held*, the Chief Court cannot revise an order of a Collector granting permission under section 539 of the Civil Procedure Code, 1882, to institute a suit for the removal of a *mahant*.

*Petition under section 70 (a) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of C. M. King Esquire, Collector, Gurdaspur District, dated the 15th January 1909.*

Muhammad Shafi, for petitioner,

Oertel, for respondent.

The judgment of the learned Chief Judge was as follows:—

11th Nov. 1910.

REID, C. J.—A preliminary objection, that no revision under section 70 (1) (a) lies, has force. The order complained of is by the Collector of a district, granting permission, under section 539 of the late Code of Civil Procedure, to one Jagat Das to institute a suit for the removal of a *mahant*.

The order is, in my opinion, an executive or administrative order only, and there is at present, in my opinion, no 'case' of which the record can be called for and dealt with in revision.

If Jagat Das institutes a suit, the defendant-petitioner will be at liberty to object that one man alone cannot sue, or raise any other objection, but this Court cannot be moved at this stage. *Amdoo Miyan v. Muhammad Davul Khan Bahadur* (1) does not

(1) (1901) *I. L. R.* 24 *Mad.* 685.

help the petitioner as it deals with an order passed by a District Court (Divisional Court in this province) granting permission for the institution of a suit under section 18 of the Religious Endowment Act, XX of 1863.

The Collector did not act as a Court but exercised the powers exercised in Presidency towns by the Advocate-General.

In *Sajedur Raja Chowdhuri v. Gour Mohan Das Baishnav* <sup>(1)</sup>, the Collector's order was attacked after a suit had been instituted and a decree passed. I dismiss this application, but, having regard to the fact that permission was granted to one man only, section 539 providing for a suit by two or more, I leave the parties to bear their own costs of this Court.

*Revision rejected.*

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<sup>(1)</sup> (1897) I. L. R. 24 Cal. 418.





# Chief Court of the Punjab.

## CRIMINAL JUDGMENTS.

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### No. 1.

*Before the Hon'ble Mr. F. A. Robertson, Officiating Chief Judge, and Hon'ble Mr. Justice Shah Din.*

CHANAN AND RAGHU RAM (CONVICTS),—  
PETITIONERS,

*Versus*

THE CROWN,—RESPONDENT.

Criminal Revision No. 1532 of 1908.

*Criminal Procedure Code, Act V of 1898, sections 4, clause (m), and 476—"Judicial proceedings" includes execution proceedings—Jurisdiction of executing Court to decide question of genuineness of the decree.*

*Held* that judicial proceedings for the purposes of the Criminal Procedure Code are any proceedings, in the course of which the presiding Judge may, under any circumstances, legally take evidence on oath (*vide* section 4, clause (m)), and *ergo* that execution proceedings are judicial proceedings within the meaning of section 476 of the Code.

*Held* also, that before it could be held that the Munsiff had not pecuniary jurisdiction to entertain an application for execution and to conduct execution proceedings, it was for the applicant to prove that the amount of the decree sought to be executed exceeded Rs. 1,000, and this could obviously not be done when the decree was fictitious.

*Held* further, that a Munsiff before whose Court an application for execution of a decree is presented, has power to decide whether or not the decree sought to be executed was a genuine one and his proceedings are not *ab initio* void, because he finds that there is no such decree in existence.

*Kanto Ram Das v. Gobardhan Das* (1) dissented from; *Bhola Nath Dey v. The Emperor* (2) followed.

*Petition under section 435 of the Criminal Procedure Code for revision of the order of M. L. Waring, Esquire, Sessions Judge, Jullundur Division, dated the 15th October 1908.*

Lal Chand and Lachmi Narain, for petitioners.

Government Advocate, for respondent.

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(1) *I. L. R. XXV Cal. 133.*

(2) *X C. W. N. 55.*

The order of the learned Judge, who referred the case to a Division Bench, was as follows :—

30th March 1909.

RATTIGAN, J.—The question of law (*i. e.*, as to whether execution proceedings are “judicial proceedings” for the purposes of section 476, Criminal Procedure Code, and whether the Munsiff had jurisdiction to act under that section) should be decided by a Division Bench. In the case referred to in my order, dated 4th November 1908, the question of law could not be decided, as the parties arrived at a settlement, but I would refer to my order in that case, dated 17th October 1908, where the legal questions are discussed (see Criminal Revision No. 792 of 1908, Division Bench).

Mr. Lachmi Narain applies for bail for Raghu Ram, and Mr. Turner raises no objection. He may be released, therefore, on bail on giving security to the satisfaction of the District Magistrate.

The judgment of the Court was delivered by—

10th July 1909.

SHAH DIN, J.—The facts of this case, so far as they are material to the decision of this Criminal Revision, are as follows :—

On the 29th August 1894, one Ram Chand, father of Chanan Mal, petitioner No. 1, and brother of Raghu Ram, petitioner No. 2, obtained a decree for Rs. 999 and costs against one Naurang.

The amount of the decree was payable by half-yearly instalments of Rs. 50 each, the last of which was due on *Naman's* Sambat 1961. Part of the amount due under the decree was paid by the judgment-debtor, and the balance became time-barred. No other decree was ever passed in favour of Ram Chand against Naurang. Ram Chand died in May 1896, and Naurang died in July 1901. On the 17th of July 1907, Chanan Mal, petitioner No. 1, and Raghu Ram, petitioner No. 2, as guardian for his minor nephew Rallia Ram, presented in the Court of Lala Prabhu Dyal, Munsiff, 1st class, Jullundur, an application for execution of a decree alleged to have been passed on the 15th August 1901, in favour of Ram Chand against Naurang, for the sum of Rs. 1,056 and costs. Part of the amount due under the said decree was stated to have been paid out of Court, leaving a balance of Rs. 865, in respect of which execution was claimed. As a matter of fact, no decree had been passed on the 15th August 1901 in favour of Ram Chand against Naurang, and all the statements of fact contained in the application for execution presented on the 17th of July 1907 were false. To support the application aforesaid a false entry No. 61

had been fabricated in the register of suits kept in the Munsiff's Court.

Upon suspicion being aroused as to the genuineness of the decree sought to be executed by the petitioners, the Munsiff enquired into the matter, with the result that it was discovered that the alleged decree was absolutely fictitious, and that the entry in the register of suits relating to the said decree had been forged. Upon this the Munsiff took action under section 476 of the Code of Criminal Procedure, the result of which was the prosecution of the petitioners for offences under sections 193 and  $\frac{210}{211}$ , Indian Penal Code. The Magistrate has convicted both the petitioners of the offences aforesaid, and the convictions having been upheld by the Sessions Judge, the petitioners have come up to this Court on the revision side.

The learned Judge in chambers, before whom this petition for revision came on for hearing in the ordinary course, has referred it to a Division Bench for decision, in view of the importance of the questions of law involved, namely, (1) whether execution proceedings are "judicial proceedings" for the purposes of section 476 of the Code of Criminal Procedure; and (2) whether the Munsiff, who took action under the aforesaid section, had jurisdiction at all to act thereunder as an executing Court. These questions have been argued before us on both sides at some length, and, though one or two other points relating to the merits of the case have also been discussed in argument, the decision of this petition for revision turns substantially upon the answers to be given to the questions stated above. We shall, therefore, take up these questions in order.

Upon the first question, Mr. Lal Chand, who appeared for the petitioners, has strenuously contended that execution proceedings, which are held subsequently to the trial of a suit, are not "judicial proceedings" within the purview of section 476, Criminal Procedure Code, and that, therefore, the Munsiff, in whose Court the petitioners presented the application for execution, dated the 17th July 1907, had no power to act under that section so as to send the case to a Magistrate for trial in respect of offences alleged to have been committed by the petitioners under sections 193 and  $\frac{210}{211}$ , Indian Penal Code.

In support of this contention, the learned advocate has relied upon the decisions of the Calcutta High Court in *Hara-*



*charan Mookerjee v. King Emperor* <sup>(1)</sup> and *Kanto Ram Das v. G. bandhan Das* <sup>(2)</sup>. The first-mentioned case is, in our opinion, clearly distinguishable from the case before us, and in no way helps the petitioners. In that case the Munsiff, who was executing the decree, had passed final orders for the delivery of possession of lands, the subject-matter of execution, to the decree-holder, and a warrant for the delivery thereof was entrusted for execution to the Nair. The Nazir went to the spot to deliver possession, but was obstructed by the judgment-debtor, and on his reporting the matter, the Munsiff held an enquiry under section 476, Criminal Procedure Code, and sent the accused to the Magistrate for trial under section 186, Indian Penal Code. The High Court held that the judicial proceedings in the case determined when the Munsiff finally decided the case, and that there being no further question left for determination as to the rights of the parties to the execution case upon which evidence could have been legally taken, the obstruction offered to the Nazir's action in delivering possession was an act committed, not in the course of a judicial proceeding, but after the judicial proceeding was over; and that, that being so, the Munsiff had no power under section 476 of the Criminal Procedure Code to hold an enquiry. It will be observed that upon the question which came up for decision in the case just cited, there was a difference of opinion between the learned Judges (Harington and Pargiter, JJ.) who constituted the Division Bench, and that in consequence of that difference of opinion the case was referred to a third Judge (Henderson, J.) for decision. As at present advised, we are disposed to think that the view taken by Pargiter, J., in his dissentient judgment (page 370) was the more correct view; but it is unnecessary to express our final opinion on the point, as it is clear to our minds that the *ratio decidendi*, which underlies the ruling of the Calcutta High Court, does not govern the present case. The observations made by Harington, J., at page 369 of the report, and those made by Henderson, J., at page 372 (last paragraph) and page 373 (first paragraph), serve clearly to distinguish the facts of that case and the law applicable to them from those of the case before us. In this case the execution proceedings were initiated by the petitioners filing the application for execution, dated the 17th July 1907, and the Munsiff became seized of the execution case as soon as the said application was presented in his Court. The presentation of the application was, in our opinion, clearly a stage of a judicial

<sup>(1)</sup> *I. L. R.*, XXXII Cal., 367.

<sup>(2)</sup> *I. L. R.*, XXXV Cal., 133.

proceeding (*Queen-Empress v. Bapuji Ditya Ram* (1), at page 298, second paragraph), and as the Munsiff was seized of the case and had passed no final orders in the matter of execution before taking action under section 476, Criminal Procedure Code, there can be no doubt that the offences with which the petitioners were subsequently charged were "brought under his notice in the course of a judicial proceeding" within the meaning of the said section. For the purposes of the Criminal Procedure Code, the expression "judicial proceeding" is defined as including "any proceeding in the course of which evidence is or may be legally taken on oath" (section 4, clause (m)). The test, therefore, which has to be applied to a particular proceeding before a Court to determine whether it is or is not a "judicial proceeding" for the purposes of section 476 of the Code is, whether in the course of that proceeding the presiding Judge has the power legally to take evidence on oath, not whether he has actually taken such evidence. If the Judge may, under any circumstances, legally take evidence on oath in the course of any proceeding, that proceeding is a "judicial proceeding" for the purposes of the Criminal Procedure Code, though as a matter of fact he may not feel called upon, in view of the nature and circumstances of the proceeding before him, to take any evidence at all. In the present case, as soon as the application for execution was presented, there commenced, by reason of such presentation, proceedings, in the course of which the Munsiff, being seized of the matter of execution, had every power to take evidence on oath; and that being the case, the proceedings before him, which began with and included the presentation of the said application, were "judicial proceedings," as defined by section 4 (m), Criminal Procedure Code; and all the orders passed by him during the pendency of those proceedings were passed in exercise of his judicial functions. A reference to the record of this case shows that on the application for execution being made by the petitioners on the 17th July 1907, the Munsiff passed an order calling for the usual report from the office as to the particulars of the decree, and, on that report being furnished, passed a second order sending for the record. A third order was passed on the 5th August 1907, embodying the result of the inspection of the record by the Munsiff, and directing the decree-holders and the judgment-debtors to appear before him. Various orders were subsequently passed from time to time, all intended to form part of the enquiry into the genuine-

ness of the alleged decree that was sought to be executed, and the judgment-debtor's legal representative, Gahiya, and Raghu Ram, petitioner No. 2, were examined on oath. Surely all these orders were passed and must be taken to have been passed, in the exercise of judicial functions, and the proceedings, in the course of which these orders were passed and the parties' statements recorded, were throughout judicial proceedings.

The second decision of the Calcutta High Court, *viz.*, *Kanto Ram Das v. Gobardhan Das* <sup>(1)</sup>, upon which reliance is placed by the petitioners' advocate, doubtless goes far to support his contention, inasmuch as it has been held in that case that execution proceedings subsequent to the trial of a suit are not judicial proceedings for the purposes of section 476, Criminal Procedure Code. There is, however, no discussion at all of the question involved in this judgment, and the learned Judges have ruled to the above effect simply on the authority, as they understood it, of the decision in *Haracharan Mookerjee v. King-Emperor* <sup>(2)</sup>. The last-mentioned case, however, does not, as we have seen, lay down the law in such wide terms as has been done in the decision under notice, and in view of the foregoing discussion of the question, we are not prepared to follow this later decision of the Calcutta High Court.

There is another decision of the same High Court reported as *Bhola Nath Dey and others v. the Emperor* <sup>(3)</sup> which is in conflict with the case of *Kanto Ram Das v. Gobardhan Das* <sup>(1)</sup> and is in perfect accord with the view that we are disposed to take in this case. In that case a decree-holder proceeding to execute a warrant of attachment of the moveable property of the judgment-debtor issued by a Munsiff, was obstructed by the judgment-debtor and other persons, who beat the decree-holder and threatened to beat the peon. The peon reported the matter to the Munsiff, whereupon the latter, after holding an enquiry under section 476, Criminal Procedure Code, ordered the prosecution of the offenders under section 183, Indian Penal Code. Upon these facts, the High Court held that the Munsiff had power under section 476 to direct the prosecution, as the facts were brought under his notice in the course of a proceeding in an execution case which had not been finally disposed of, and which was a "judicial proceeding" within the meaning of the section aforesaid. *Hara-*

<sup>(1)</sup> I. L. R. XXXV Cal., 133.

<sup>(2)</sup> I. L. R. XXXII Cal., 387.

<sup>(3)</sup> X C. W. N. 55.



*charan Mookerjee v. King-Emperor* (1), which was cited for the accused in that case, was distinguished on the ground that there the Munsiff had, before the Nazir was obstructed by the judgment-debtor, passed an order for possession which had finally determined the case. This case of *Bhola Nath Dey v. The Emperor* (2) was, we think, correctly decided, and agreeing with this decision, we held that the proceedings before the Munsiff, which were initiated by the petitioner's application for execution dated the 17th July 1907, were judicial proceedings for the purposes of section 476, Criminal Procedure Code.

Upon the second question that arises in the present case, the argument of the petitioners' learned advocate was twofold. In the first place, it was contended that the decree which was sought to be executed being one for Rs. 1,056 the Munsiff, the pecuniary limits of whose jurisdiction did not exceed Rs. 1,000, had no jurisdiction to execute the decree or to entertain the application; and that, therefore, no offence under section 193 or under sections  $\frac{210}{511}$  could have been committed in respect of the said application for execution by the petitioners.

In the second place, it was urged that the decree being a fictitious one, the Munsiff could have no jurisdiction at all, apart from other considerations, to execute such a decree, and that the proceedings taken by the Munsiff were *ab initio* void and legally of non-effect. In regard to the first part of the argument, it is sufficient to say that the *onus* lay upon the petitioners of showing that the amount of the decree sought to be executed exceeded the pecuniary limits of the Munsiff's jurisdiction, and obviously this *onus* they are unable to discharge for the simple reason that admittedly the decree in question is a fictitious one, and the petitioners, therefore, cannot possibly prove that it was passed in a suit of the value of more than Rs. 1,000. Unless that could be definitely shown, it cannot be affirmed that the Munsiff's jurisdiction was ousted.

With regard to the second branch of the contention, it seems to us that the decree being a fictitious one, no question of jurisdiction in respect of its execution can arise at all, and it cannot be said that because the Munsiff, on discovering that the decree was fictitious, could not or would not execute it, therefore, his proceedings, so far as regards the deter-

(1) I. L. R., XXXII Cal., 367.

(2) X C. W. N. 55.

mination of the question of the genuineness or otherwise of the decree, were altogether void for all purposes whatsoever. On the petitioners presenting an application for execution of a decree alleged to have been obtained by them against the judgment-debtors, the Munsiff, in our opinion, had every power to determine whether the decree in question had or had not been so obtained, and for that purpose to exercise the judicial functions of a Court. No authority has been cited to us in support of the view that in a case similar to the present, the Court to which an application of the kind under consideration is made has no power at all to enquire into and decide the question of the genuineness of the decree sought to be executed, and we are quite clear that the Court would certainly have such inherent power, as otherwise most anomalous and grotesque consequences might ensue. We, therefore, overrule this contention and hold that the Munsiff had the power to entertain the application for execution filed by the petitioners, and to decide whether or not the decree sought to be executed was a genuine one.

Mr. Lal Chand also contended that Raghu Ram, petitioner No. 2, was in no case liable to be prosecuted, as his name, though it originally appeared on the application, was struck out, and he was in no way concerned in the execution of the decree. We think upon a reference to the record that Raghu Ram was a party to the application in question; and in any case, as this point was not raised in the grounds for revision, we decline to take notice of it at this stage of the case.

There was some argument as to the applicability of sections 210 and 511, Indian Penal Code, to the present case, but it is unnecessary to decide the point, as the record shows that the order passed by the Munsiff under section 476, Criminal Procedure Code, relates only to the commission of an offence under section 193, Indian Penal Code, and makes no mention of an offence having been committed under sections  $\frac{210}{511}$ , Indian Penal Code. We think, therefore, that the petitioners should not have been tried for, and convicted of, an offence under sections  $\frac{210}{511}$ . The conviction under these latter sections is, therefore, quashed. This, however, in no way affects the sentences passed on the petitioners, which, as the judgment of the Magistrate shows, were passed only in respect of an offence under section 193, Indian Penal Code.

The alleged severity of the sentences passed was also touched upon in argument, but in view of the very serious nature of the offence committed and of the very grave consequences that would ensue from treating conduct like that of the petitioners in this case with leniency, we see no reason to interfere with the sentences, which are hereby maintained.

We dismiss the petition for revision.

*Revision rejected.*

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**No. 2.**

*Before the Hon'ble Mr. F. A. Robertson, Offg. Chief Judge,  
and Hon'ble Mr. Justice Shah Din.*

THE CROWN THROUGH MUNICIPAL COMMITTEE,  
LAHORE,

*Versus*

KANHAYA LAL AND GOPAL DAS, ACCUSED.

Criminal Revision No. 63 of 1909.

*Punjab Municipal Act, XX of 1891—Sections 42 (1) (f) and 201—Imposition of tax on the goods stored at a place originally outside the octroi zone and brought subsequently within it—Duty of Magistrate to enquire whether tax is intra vires before acting under section 201.*

*Held, that a Municipal Committee is not competent to levy octroi upon goods which were originally brought to a place outside the octroi limits and remained there after the octroi limits had been extended, so as to bring the place within the octroi zone, as such goods cannot be said to have been brought within the octroi limits within the meaning of section 42 (1) (f) of the Punjab Municipal Act, 1891.*

*Held also, that it is the duty of a Magistrate to whom an application is made on behalf of a Committee under section 201 of the Punjab Municipal Act, 1891, to see that on the facts as stated by the claimant the amount is claimable, i.e., whether the claim is intra vires or ultra vires, and if he finds that the sum claimed is beyond the power (i.e., ultra vires) of that Committee he is bound to refuse the application.*

*Case reported by H. P. Tollinton, Esquire, Sessions Judge,  
Lahore Division, dated 23rd December 1908.*

Beechey, for the Municipal Committee.

Bodhraj, for accused.

The facts of this case are as follows :—

The octroi boundaries of the Lahore Municipality were extended by Punjab Government Notification No. 338, dated



2nd June 1908; and several merchants whose goods were stored without the original limits were called upon by the Municipality to pay octroi on such goods as by the publication of the notification were brought within the new Municipal limits.

Mr. E. R. Anderson, City Magistrate, exercising the powers of a Magistrate of the 1st class in the Lahore District, by order dated 23rd November 1908, ordered, under section 201 of the Punjab Municipal Act, the attachment of petitioner's property for the recovery of Rs. 193-13-3 on account of the octroi claimed.

The proceedings are forwarded for revision on the following grounds:—

( Criminal revisions Nos. 134 and 136 of 1908 are also dealt with in this order).

In June 1908 the octroi boundaries of the Lahore Municipality were extended. Octroi was charged on dutiable goods which were admittedly within the area covered by the extension, previous to the extension. An application for attachment of petitioner's property was made to a Magistrate for recovery of the arrears of the tax. He passed an order of attachment under section 201 of Act XX of 1891. Petitioners objected. The Magistrate considered that he had no right to entertain the objection. Petitioners now apply for revision of the order refusing to entertain the objection. It is not necessary for me to decide whether the Magistrate could entertain the objection. The present petition may be considered as a petition for revision of the order of attachment which may be revised under section 439 of the Criminal Procedure Code. *Din Muhammad v. The Municipal Committee of Amritsar* <sup>(1)</sup> octroi is leviable under section 42 (1) (f) of Act XX of 1891 on goods brought within octroi limits.

These goods were not brought within octroi limits. Had the limits been originally as they are now the goods would in all probability not have been brought into the area now included in octroi limits.

The proceedings are accordingly forwarded with the recommendation that the attachment be set aside, as the tax is not claimable.

*Order of the Chief Court.*

19th July 1909.

ROBERTSON, OFFG. C. J.—This case was sent up by Mr. Tollinton, Divisional and Sessions Judge of Lahore, for the

(<sup>1</sup>) 23 P. R. 1903, Cr.

revision of an order passed by Mr. Anderson, a Magistrate of the 1st class in Lahore, on 23rd November 1908.

The facts are simple. The petitioners had a shop which was situated outside the octroi-paying limits of the Lahore Municipality. It is alleged by Mr. Beechey, Counsel for the Municipal Committee, that much loss was caused by customers going out to these shops purchasing in small quantities, and returning without paying octroi. It was therefore determined to bring these shops, and the suburb where they are situated, within the Municipal limits, and the Local Government accordingly issued a notification, No. 338 of 2nd June 1908, in these terms :—“ \*  
“ \* \* \* \* \* is  
“ published for general information, in supersession of notification No. 63, dated 14th February 1895, and will come into  
“ force six weeks from the date of publication of this notification,  
“ &c. (giving the new boundaries).” The effect of that notification was to bring the shops of the petitioners within the octroi zone.

It appears that in anticipation of the effects of this notification the Municipal authority gave notice to the petitioners that they would be charged octroi duty upon all octroi-paying goods found in their premises after the expiry of six weeks after 2nd June, and after that date, they proceeded to claim octroi dues to a considerable amount from the petitioners. It is made a ground of complaint by Mr. Beechey that the petitioners sent large quantities of goods out of the zone and recovered rebates. But it is quite obvious that if they were to be made to pay octroi they were entitled to rebates, and the wording of section 72 of the Municipal Accounts Code certainly lends facilities to acts of this kind even if octroi dues have not in fact been paid.

Various objections are taken to certain irregularities in the method of making and pressing the claim, but we prefer to come at once to the main points in the case, of which the first is, were the Committee competent to levy octroi upon goods which were never moved by the owners, which were outside the octroi zone before the 2nd June and the 14th July, and which on the 15th July were, by action of the Committee and the Government, within that zone.

Now the authority for the imposition of this tax is section 42 (f) of the Punjab Municipal Act. It must be remembered that the notification distinctly says that it shall not come into force until

after six weeks have expired from 2nd June. It is therefore quite clear that the liability to the tax could only be incurred after the six weeks had expired, and that it must be shown that *after* the 14th July the goods had been in the words of section 42 "*brought* within the octroi limits for consumption or use therein." Now it is quite clear that these were *not* brought within the octroi limits after the notification came into force, they were in the same place as before the 14th July, and the notification clearly took no retrospective effect. We have been shown no provision of this or any other act under which the Committee were competent to call upon the petitioners to remove their goods on pain of paying duty because *for the future* the octroi limits were to be changed. Nor, do we for a moment believe that the legislature contemplated any such step. All goods brought across the line after 14th July will be liable, goods already within the line do not fulfil that test and are clearly not liable to octroi duty.

This disposes of one of the main points and makes it unnecessary to consider the various other less important questions regarding less important irregularities.

There remains, however, another very important question and it is this.

The petitioners were called upon to pay the octroi demand made upon them by means of an application under section 201, Punjab Municipal Act, made to a Magistrate. That section runs as follows :—

"Any arrears of any tax or fee or any other money claimable by a Committee under this Act may be recovered, on application to a Magistrate having jurisdiction within the limits of the Municipality, or in any other place where the person from whom the money is claimable may for the time being be resident, by the distress and sale of any movable property within the limits of his jurisdiction belonging to such person."

And it is contended that the Magistrate under that section must act purely as a ministerial officer and has no course open to him but to recover whatever amount the Committee may state to be due.

It is urged that a remedy is provided by section 52 of the Act by way of appeal to the Commissioner for all improper attempts to levy sums not properly due, and that when an



application is improperly made under section 201, the remedy is an appeal under section 52 and that every other remedy is barred by section 54.

Now it is quite clear that section 52 and section 54 are confined to actions taken under the Act, and we are quite in agreement with Mr. Beechey, when he urges that section 52 provides the remedy for mistakes or incorrect action under the Act. And this brings us to the crux of the question. Section 201 provides that any tax, fee, or other money *claimable by a Committee under this Act* may be recovered, etc. To our minds it is quite clear that these words "claimable under this Act" govern the whole case. It is the Magistrate's clear duty to satisfy himself that the money is *claimable (not due)* under the Act, and Mr. Beechey has failed to quote any authority to the contrary. We have examined all those quoted, *W. J. Ellis v. The Municipal Board of Mussoorie* (1), *The Municipality of Ahmedabad v. Jumna Punja* (2), *The Municipality of Wai v. Krishnaji* (3), *Dwarka Nath Datt v. Addya Sundari Mittra* (4), *Municipal Council of Tuticorin v. South Indian Railway* (5), *Leman v. Damodaraya* (6), and none of them appears to us to support the contention. In *W. J. Ellis v. The Municipal Board of Mussoorie* (1) it is laid down that it is not for the Magistrate to enquire whether the actual amount claimed as an arrear was in fact due. In *The Municipality of Wai v. Krishnaji* (3) it was held that a Magistrate could not go behind the values computed by the Committee within their legal powers. *Municipal Council of Tuticorin v. South Indian Railway* (5) does not at all assist Mr. Beechey's argument, nor does *Leman v. Damodaraya* (6), nor can we see that *Dwarka Nath Datt v. Addya Sundari Mittra* (4) does so either. General principles as to the interpretation of the Municipal Act and the powers of the Courts to control them if "*ultra vires*" are laid down in *Badri Das v. Municipal Committee, Delhi* (7), *Mussammat Jafaran v. The Empress* (8) and *The Empress v. Khubi Ram* (9). In our opinion it is clear that the duty of the Magistrate is to see that on the facts, as stated by the claimants, the amount would be claimable, i.e., whether the claim is *intra vires* or *ultra vires*. If the Municipality is properly constituted

(1) *I. L. R. XXII All.* 111.(5) *I. L. R. XIII Mad.*, 78.(2) *I. L. R. XVII Bom.* 731.(6) *I. L. R. I Mad.* 158.(3) *I. L. R. XXIII, Bom.* 446.(7) 90 *P. R.* 1898.(4) *I. L. R. XXI Cal.* 319.(8) 4 *P. R.* 1887, *Cr.*(9) 27 *P. R.* 1889, *Cr.*

and competent to levy the tax in the area in which it is sought to levy it, the Magistrate is not competent to enquire whether the amount claimed under a tax, duly and legally imposed and said to be in arrear, is due or not, the remedy as to that lies under section 52, but if he finds that the sum claimed could not be legally claimed from anyone, *i.e.*, is beyond the power, *ultra vires*, of the Committee, then he is bound to refuse to act.

These views are also those expressed in *Lalji v. Municipal Committee, Lahore* (1), which is much in point. The learned Judge in that case said "so when an application is made under "section 172, I consider that the Magistrate, if the point is "raised, must satisfy himself that the Committee applying to "him is legally constituted and that the amount claimed, is "claimed under a tax or assessment legally imposed by the "Committee." The discussion of the meaning and force of the word "claimable" in that judgment will repay perusal. Section 172 of the old Act corresponds to section 201 of this Act.

In the case before us, we think that there was no sum "claimable" from the petitioners on account of any legally imposed tax on behalf of the Municipality and that their action was *ultra vires*. Consequently the Magistrate applied to under section 201 should have refused to act as the claim did not come within the scope of that section. The Magistrate's order is set aside accordingly. This disposes of the case, it is unnecessary to discuss any other points.

*Revision accepted.*

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### No. 3.

*Before the Hon'ble Mr. Justice Johnstone.*

ABDULLA AND OTHERS,—(ACCUSED),—PETITIONERS,

*Versus*

THE KING—EMPEROR OF INDIA,—RESPONDENT.

Criminal Revision No. 1070 of 1909.

*Criminal Procedure Code, 1898—Transfer of cases by District Magistrate of his own motion—Section 528—Notice to parties before transfer—Section 190 (b)—Police-report—Grounds on which a superior Court should transfer a case on application by a party.*

The police, acting under section 2, Criminal Procedure Code, reported to a Sub-Divisional Magistrate that they had arrested a gang of men under

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(1) 1 P. R. 1891, Or.

section 151, Criminal Procedure Code. The Sub-Divisional Magistrate ordered *chalan* under section 143, Indian Penal Code, and the police obeyed. The accused, after some witnesses had been heard by the Sub-Divisional Magistrate, applied to the District Magistrate for transfer of the case to some other Court. The District Magistrate rejected the application, but suggested trial by the Tahsildar, within whose power the case was. The Sub-Divisional Magistrate, then, finding his own work heavy, transferred the case to Tahsildar, but before the first hearing the District Magistrate ordered re-transfer to Sub-Divisional Magistrate, giving no reasons. The Sessions Judge refused to interfere. On accused coming to Chief Court with a petition that the case be heard by the Tahsildar, *held* that there was no reason to interfere, because—

- (i) The Sub-Divisional Magistrate in ordering *chalan* was acting not under section 190 (c), Criminal Procedure Code, but under section 190 (b) ;
- (ii) Therefore he was not bound to give accused any option as to the Court they should be tried by ;
- (iii) No notice by District Magistrate to the accused was necessary before passing his order of transfer to Sub-Divisional Magistrate ;
- (iv) Though section 528 (3) requires District Magistrate to give reasons for transfer, the absence of any statement of reasons cannot properly result in mere cancellation of the order.

*Bakhsh v. Tahluram* <sup>(1)</sup>, distinguished ; *Queen-Empress v. Kuppu Muthu Pillai* <sup>(2)</sup>, approved ; *Imperatrix v. Sadashiv Narayan Joshi* <sup>(3)</sup>, distinguished.

*Petition for revision under section 439, Criminal Procedure Code, of the order of C. L. Dundas, Esquire, Sessions Judge, Rawalpindi Division, dated the 17th August 1909.*

Pestonji Dadabhai, for petitioners.

Broadway and Miran Bakhsh, for respondent.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In order to explain clearly my views in this 6th October 1909. case I must begin by giving a brief history of it. In June last it was reported to the Superintendent of Police, Attock District, that some 30 men had collected at Damal in the mosque and had been detained there, as they were armed and probably contemplated some crime. This was done under section 151, Criminal Procedure Code. On intimation of this under section 62,

(1) 28 P. R. 1902, Cr.

(2) I. L. R. 24 Mad. 317.

(3) I. L. R. 22 Bom. 549.



Criminal Procedure Code, to the Sub-Divisional Magistrate he ordered the police to *chalan* under section 143, Indian Penal Code. And this was done on 29th June. Two witnesses were examined, and then the case was postponed because the accused said they intended to apply to higher authority for the transfer of the case from that to some other Court. The Magistrate at the same time called upon each accused to furnish bail in Rs. 500.

The District Magistrate to whom application for transfer was made, rejected it, but at the same time asked the Magistrate to explain why he had fixed the security so high in so "trifling" a case and also hinted that the case was one triable by Tahsildar (2nd class Magistrate). This was on 9th July.

On 24th July when the case was again called by the Magistrate, he noted that there was a press of work in his Court, and that, as the case was triable by a Tahsildar, it should be transferred there and be heard on August 5th.

On 2nd August the District Magistrate again took cognizance of the matter, though no application had been apparently made to him by the prosecution or the defence, and without giving any reasons, directed that the case should at once be sent back to the Sub-Divisional Magistrate for trial by himself. This was done without notice to either party.

On 17th August some or all of the accused persons applied to the Sessions Judge against this order, pointing out (a) that the order disclosed no reasons or source of information and was therefore *ultra vires*; (b) that the order was contrary to the order of 9th July of the same officer; (c) that the orders of 7th and 24th July were sound and gave good reasons. This petition was rejected on the ground that "the District Magistrate is "merely directing the Sub-Divisional officer to carry out the order originally given him."

The accused have come up here with a further petition demanding cancellation of the order of 2nd August and the trial of the case by the Tahsildar. Summarised the reasons given are—

(a) The accused have no hope of a fair trial by the Sub-Divisional Magistrate.

(b) No notice was given to accused to show cause against the order of 2nd August.

(c) No "reasons" are assigned in that order.

(a) Here two lines of argument are adopted, both equally futile and absurd. The first is the technical and legal argument. It

is said that, when the Sub-Divisional Officer listened to the information given by the police and ordered them to *chalan* under section 143, Indian Penal Code, he acted under clause (c), section 190, Criminal Procedure Code, and so was bound to proceed under section 191, and ask accused at the commencement of the case whether they consented to be tried by him. This seems to me mere nonsense. Clause (c) expressly refers to information "received from any person *other than a police officer*," and cannot possibly cover a case of information derived from the police. Further, the case clearly comes under clause (b). The Magistrate heard a "police-report." There is no foundation for the idea put forward by Mr. Pestonji, that a "police-report" here means only a *chalan*, I see no difficulty in calling a "report" by the police under section 62, Criminal Procedure Code, a "police-report." Thus, no positive legal bar exists to the trial of the case by the Sub-Divisional Magistrate, and he was not at all bound to give the accused any option as to whether they would be tried by him or not. The second line of argument is that in the circumstances the accused, knowing the Sub-Divisional Magistrate had ordered their *chalan*, have a reasonable apprehension that the Sub-Divisional Magistrate has already formed an opinion adverse to them, and so they will not have a fair trial. This is to my mind a preposterous proposition. The Sub-Divisional Magistrate is not shewn to have expressed any opinion upon the guilt or innocence of the accused: he merely said in effect that, on the allegations made by the police and said by them to be provable by evidence, the case seemed one of unlawful assembly and should be *chalaned* as such. In my opinion there is absolutely no ground why the accused should fear they are not going to be impartially dealt with.

(b) No doubt it has been ruled—See *Bakhsha v. Talhu Ram* (1) and elsewhere—that, though there is no statutory provision to this effect, notice should be given to the opposite party before an application for transfer of a criminal case is granted. But here there was no *application* for transfer. The District Magistrate fully explains in his note of 21st September, how the transfer to the Tahsildar came about and why the re-transfer to the Sub-Divisional Magistrate was ordered. The distinction between a case of this sort and a case of transfer at the instance of a party is clear enough without reference to any authority, but I may quote *Queen-Empress v. Kuppu Muthu Pillai* (2). The ruling quoted by Mr. Pestonji on the other side—*Imperatrix*

(1) 28 P. R. 1902. Cr.

(2) I. L. R. 24 Mad. 317.

v. *Sadashiv Narayan Joshi* <sup>(1)</sup> is concerned with very peculiar facts, and, whether it is sound or not, it affords no guide in a case like the present. What the District Magistrate has really done is this. In his earlier order he declined to hold that the Sub-Divisional Magistrate was unlikely to accord to the accused a fair trial, and so he refused to order a transfer. At the same time at that stage he evidently thought the case a trifling one and so suggested a transfer to the Tahsildar. This suggestion must have been made on administrative ground only. Later, he must have become aware that the case was more important than he had formerly imagined, and so, again on administrative grounds and not in the least, because he doubted the impartiality of either the Sub-Divisional Magistrate or the Tahsildar, he re-transferred the case before the Tahsildar had done anything in it. I rule unhesitatingly that in such circumstances no notice to accused was necessary.

(c) This is a useless argument. No doubt under section 528 (3), Criminal Procedure Code, "reasons" for transfer should be recorded. But the result of not recording reasons cannot in practice be the absolute cancelment of the order of transfer. The real effect of the sub-section is, that, when reasons are not recorded, the superior Court will call for reasons; and this has been done here and the demand has been successfully met. That this is in practice the only possible course is clear, for, if this Court had simply cancelled the order of 2nd August, no one could have prevented the District Magistrate from sitting down next day and under section 528 recording a fresh order of transfer with "reason". This Court is not inclined to stultify itself by passing orders of the kind Mr. Pestonji contemplates.

I have long thought, that the provisions of Indian Law in regard to the transfer of criminal cases are calculated to be used, and are in practice used, not to further justice but to harass and annoy opponents; and the present case is a good instance of the tendency. This trial has been postponed and protracted in an inordinate way by these transfer applications, and it seems to me that for the application dealt with by the District Magistrate on 9th July and for the present application there was no justification whatever. Legal ingenuity has been expended not in promoting the ends of justice, but simply and solely for the purpose of delaying justice and of causing the maximum of annoyance and expense to the prosecution.

The petition is dismissed.

I hope the Sub-Divisional Magistrate will now push on with the case and dispose of it without further delay.

*Application rejected.*



## No. 4.

*Before Hon. Mr. Justice Johnstone.*

BAHADAR SHAH,—(CONVICT),—PETITIONER,

*Versus*

THE CROWN,—RESPONDENT.

Criminal Revision No. 1035 of 1909.

*Criminal Procedure Code, Act V of 1898, section 110—Accused entitled to independent examination of his case—Accused cannot be convicted on facts against him older than his previous security bond.*

*Held*, that in cases under section 110 of the Criminal Procedure Code, 1898, each accused is entitled to an entirely independent examination of his own case and if the accused has been bound down before, his conduct before the date of the previous bond cannot be imported into the subsequent case and made a ground for fresh proceedings.

*Petition under section 439 of the Criminal Procedure Code for revision of the order of S. M. Jacob, Esquire, District Magistrate, Jhang, dated the 4th June 1909.*

Tirath Ram, for petitioner.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—These two cases, 1035 and 1036 have been *6th October 1909.* argued at the same time, but they are essentially distinct, though the witnesses are more or less the same.

In section 110 cases, each accused is entitled to an entirely independent examination of his own case. This is the case of Bahadur Shah, and the Magistrate who tried it has fallen into an obvious error. Stating that last year, *i. e.*, in 1908, accused was bound over, he says he has not yet mended his ways. We are not told the date of the order in the case of last year, but the bond must have been for a year, and thus that bond cannot have expired at most more than a few weeks before the present prosecution was instituted. No conduct of the accused before the date of that bond can fairly be imported into the present case and made a ground for fresh proceeding; and yet we find not only the Magistrate but the learned District Magistrate also laying great stress upon a dacoity case of *five years ago* in which accused was acquitted. Then the first Court mentions the theft of Bahawala's buffalo and says accused promised to return it and did so. We do not know the real facts of this case, and at least one witness says it happened *two-and-a-half years ago*. Another concrete case is *four years old* (Ahmad's). Then

other cases of suspicion are mentioned, mostly 1908, and so before expiry of previous bond. It is improbable that accused would, while under bond, act in this way. The persons whose animals he was named as having stolen are persons whom he denounces, and not without reason, as being his enemies. On the whole I am of opinion that there is no sufficient evidence of a relevant kind against the petitioner. To rake up facts against him of dates older than his previous security bond is against law and justice.

I set aside the order placing Bahadur Shah on security and acquit him.

*Revision accepted.*

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No 5.

*Before Hon. Mr. Justice Johnstone.*

THE CROWN,—COMPLAINANT,

*Versus*

JALAL SHAH,—ACCUSED.

Criminal Revision No. 1107 of 1909.

*Criminal Procedure Code, Act V of 1898, section 121—Forfeiture of bonds for good behaviour.*

*Held*, that section 121 of the Criminal Procedure Code, 1898, is explicit, and it is so far, as concerns bonds for good behaviour, exhaustive, and therefore such a bond can only be forfeited for the commission or attempt to commit or the abetment of, any offence punishable with imprisonment.

*Case reported by H. Harcourt, Esquire, Additional Sessions Judge, Shahpur Division, dated the 1st September 1909.*

roadway, for Crown.

The accused, on conviction by H. Calvert, Esquire, I.C.S., exercising the powers of District Magistrate in the Mianwali District, was declared by order, dated 3rd June 1909, under section 514 of the Criminal Procedure Code, to have forfeited his security bond of Rs. 600.

The proceedings are forwarded for revision on the following grounds :—

Jalal Shah was put on security because he was in the habit of cheating with counterfeit jewelry.

Since this security order was passed Jalal Shah has been found, or rather his companion Kaku has been found, in posses-

sion of counterfeit jewelry. Granting even that under the circumstances the possession may be treated as joint between Kaku and Jalal Shah, it does not appear that there has been any commission of, or attempt to commit, or abetment of an offence though there may have been preparation, which is a different and minor matter.

The bond is of the ordinary description. It does not appear to me that it can be forfeited under 121, Criminal Procedure Code, and if not under that section, then not at all. I forward the record to the Hon'ble Judges of the Chief Court with a view to the order of forfeiture being set aside.

The order of the learned Judge was as follows:—

JOHNSTONE, J.—I agree with the learned Additional 11th October 1909. Sessions Judge that the bond cannot rightly be forfeited. I find it impossible to follow the argument of the learned counsel who on the strength of *Ananthachari v. Ananthachari* (1) (at p. 172) contends, that section 121, Criminal Procedure Code, is not exhaustive and so such a bond as this can be forfeited for any breach of "good behaviour." The section is explicit, and in my opinion it is, so far as concerns bonds for good behaviour, exhaustive. No doubt as regards bonds for preservation of the peace the definition of breach of the peace is not given and some discretion is left to the Courts; but this is not so as regards good livelihood bonds.

I set aside the forfeiture inasmuch as accused is not shown to have committed an offence, or to have "attempted", to do so, or to have abetted such a thing. Papers returned.

### No. 6.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge,  
and Hon. Mr. Justice Robertson.*

SHIBBU, &c.,—(ACCUSED),—PETITIONER,

*Versus*

THE CROWN THROUGH CHAJJU,—(COMPLAINANT),—  
RESPONDENT.

Criminal Revision No. 700 of 1909.

*Criminal Procedure Code, 1898, section 195 (1), (a)—False complaint to Police—Sanction for prosecution by District Magistrate—Police Act V of 1861, section 4.*

(1) (1878) I. L. R. 2 Mad. 169.



*Held*, that sanction for prosecution for making a false complaint to the police may, under section 195 (1), (a), Criminal Procedure Code, be granted by the District Magistrate, who exercises general control over and direction of, the police in his district under section 4 of the Police Act, V of 1861.

*Crown v. Boodh Singh* (1), (2) followed, *Ramasory Lal v. Queen-Empress* (3) dissented from.

*Petition under section 439 of the Criminal Procedure Code for revision of the order of Rai Bahadur Mul Raj, Sessions Judge, Ambala Division, dated the 11th May 1909.*

Beni Pershad Khosla, for petitioner.

The judgment of the Court was delivered by—

19th Nov. 1909.

SIR ARTHUR REID, C. J.—We see no reason for interference. Section 4, Act V of 1861, vests the administration of the police throughout the local jurisdiction of the Magistrate of the District in a District Superintendent and Assistant District Superintendents, under the general control and direction of the Magistrate of the District.

Section 195 (1), (a) of the Code of Criminal Procedure empowers Courts to take cognisance of an offence punishable under sections 172 to 188 of the Penal Code with the previous sanction, or on the complaint, of the public servant concerned or of some public servant to whom he is subordinate.

Sub-section (7) does not affect (1), (a) and is limited to offences committed in, or in relation to proceedings in Courts, and the rulings which limit the power of sanctioning prosecutions in respect thereof are therefore inapplicable to the present case.

The *Crown v. Boodh Singh*, (1), (2) is authority for holding that the District Magistrate may sanction prosecution for a false complaint to a Police Officer.

We see no reason for differing from these rulings, or for giving preference to the rulings of the Calcutta Court in *Ramasory Lal v. Queen-Empress* (3), which was practically differed from in *Emperor v. Saroda Prosad Chatterjee* (4).

*Application rejected.*

(1), 47 P. R. 1867, Cr.

(2) 9 P. R. 1868, Cr.

(3) (1900) I. L. R. 27 Cal., 452.

(4) (1905) I. L. R. 32 Cal., 180.

## No 7.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

GOKAL CHAND,—(COMPLAINANT),—PETITIONER,

Versus

PHUL CHAND AND KANHAYA LAL,—(ACCUSED),—  
RESPONDENTS.

Criminal Revision No. 886 of 1909.

*Jurisdiction—Criminal Procedure Code, 1898, section 179—Criminal misappropriation in respect of goods sent from Delhi to Calcutta for sale.*

Where the complainant's case was that he despatched goods from Delhi to the accused at Calcutta for sale on commission and that the accused had mortgaged the goods and appropriated the money to their own use, and a complaint was made at Delhi under sections 403 and 409, Indian Penal Code—

*Held*, following *Chint Singh v. Crown* <sup>(1)</sup>, that the alleged offences were complete as soon as the money had been misappropriated, and as this was alleged to have been done at Calcutta, the Calcutta Courts alone had jurisdiction, and the fact that the money should have been and was not sent to Delhi, did not give the Delhi Court jurisdiction.

*Held* also, that a Court which has not jurisdiction to try has not jurisdiction to acquit the accused, and the proper order was one of discharge.

*Petition under sections 437 and 439 of the Criminal Procedure Code for revision of the order of A. E. Martineau, Esquire, Sessions Judge, Delhi Division, dated the 14th July 1909.*

Shadi Lal, for petitioner.

Grey, for respondent.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—Counsel for the petitioner contends 4th Dec. 1909.  
that the Delhi Court had jurisdiction, because on the case set up by the prosecution, loss was caused to the Delhi firm at Delhi by the alleged misappropriation at Calcutta. *Queen-Empress v. O'Brien* <sup>(2)</sup> and *Ghulam Ali v. Queen-Empress* <sup>(3)</sup> are cited in support of this contention.

In the latter case the former was indeed cited as authority, but it was held that the case for the prosecution was that one the prisoners, in conspiracy with the other, actually cheated at Lahore and gave the Lahore Court jurisdiction.

The former authority has been specifically differed from in Miscellaneous Criminal 58 of 1900, *Chint Singh v. Crown* <sup>(1)</sup>

<sup>(1)</sup> 67 P. L. R. 1901.

<sup>(2)</sup> (1897) I. L. R., 19 All., 111.

<sup>(3)</sup> 7 P. R. 1900 Cr.

where it was held that the words "any consequence that has ensued" in section 179 of the Code of Criminal Procedure mean some consequence modifying or completing the act or acts constituting the offence, and do not include the loss resulting to an employer from criminal breach of trust by his servant.

The case for the prosecution here was that the complainant despatched goods to the accused for sale on commission, and that the accused mortgaged the goods and appropriated the money to their own use.

The offence alleged was complete as soon as the money had been misappropriated, and the fact that the money should have been, and was not, sent to Delhi did not give the Delhi Court jurisdiction, the accused having put the money into their own pocket at Calcutta.

In my opinion, following the ruling of the Division Bench of this Court last cited, the alleged offence was complete in Calcutta and the Calcutta Court alone had jurisdiction. The farther contention that section 531 of the Code justifies this Court in declining to interfere with the order of acquittal has no force.

Had the acquittal been on the merits there might have been some force in this contention, but an order of acquittal, based on the ground that the court had no jurisdiction to try the case, is obviously bad.

A Court which has not jurisdiction to try, has not jurisdiction to acquit, and the order which must, in my opinion, be passed in this case is one setting aside the charges and subsequent proceedings as being without jurisdiction and substituting orders of discharge, on the ground that the Court had not jurisdiction, and was therefore incompetent to try the accused, for the orders of acquittal.

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## No. 8.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and  
Hon. Mr. Justice Johnstone.*

THE CROWN,—PETITIONER,

*Versus*

BANSIDHAR AND GIAN CHAND,—ACCUSED.

Criminal Revision No. 1620 of 1908.

*The Indian Explosives Act, IV of 1884—"Patakhas"—license.*

*Held*, that no license for the manufacture or sale of "*Patakhas*" is required under the Indian Explosives Act, 1884.

*Case reported by M. L. Waring, Esquire, Sessions Judge, Jullundur Division, with his No. 533, dated the 2nd December 1908.*

*The facts of this case are as follows :—*

The two accused, Bansidhar and Gian Chand, shop-keepers of Jullundur city, were found in possession of a large quantity of crackers or '*patakhas*,' which are sold at the time of *shabbrat*, without obtaining a license for their sale. The accused admitted the possession but submitted that no license was required as the crackers did not fall in the definition of fire-works.

The accused, on conviction by of J. O'Neil Shaw, Esquire, exercising the powers of a Magistrate of the 1st class, in the Jullundur District, was sentenced by order, dated 25th September 1908, under section 5 of Act IV of 1884 to a fine of Rs. 10 each which has been paid.

*The proceedings are forwarded for revision on the following grounds :—*

The question is whether the articles, known as *patakhas* of which they were in possession, come within the meaning of the term *fire-works* as used in the Act. A *patakha* consists of a pinch of coloured potash rolled up with one or two little bits of *kankar* in a piece of paper and tied up with twine, the whole forming a pellet which explodes on concussion. Though the Magistrate's reasoning is not very convincing, it is certainly possible to maintain logically that this pellet is a fire-work; but the same logic would oblige us to hold that a Christmas cracker or a lucifer match was a fire-work—a conclusion repug-

nant to practical sense. The line to be drawn round the definition of fire-works must I think be fixed, not by stretching the meaning of a word to its utmost length, but by a consideration of the question whether there is any advantage to the community in calling a thing a fire-work, which is not expressly described as such by the Act and the Notifications.

In the case of *patakhas* there seems to be none, and I refer the point to the Chief Court with a recommendation that the conviction be quashed.

#### ORDER OF THE CHIEF COURT.

The judgment of the Court was delivered by—

8th Dec. 1909.

\*No. 4555—4 of  
31st May 1907, De-  
partment of Com-  
merce and Industry.

JOHNSTONE, J.—The question here is whether the *patakhas* described by the Magistrate and the Sessions Judge are fire-works within the meaning of the Act, IV of 1884 and the Notification\* under it. It seems that they are small packets, wrapped in a paper, of coloured potash mixed with small pieces of *kankar*, and that they explode with a slight report when thrown with force against a wall or other hard surface. They are not made all the year round for general use, but form a plaything at the time of *Shab-i-barat*. No doubt in a strictly literal sense they are fire-works, inasmuch as they flash and explode; but in the Punjab they have been manufactured and sold without license for 25 years, notwithstanding the existence of the Act of 1884, and we are disposed to agree with the learned Sessions Judge that no license for their manufacture or sale should be required. We think, adverting to the second class of "Explosives" as defined in the Act, that they are not used for "pyrotechnic effect," being found amusing for the unexpected report they make and not for their exhibition of flames, which is inappreciable; and we have some difficulty in assigning to them any "practical effect by explosion," words which probably connote the propulsion of missiles, or the fracture of rocks, or the blowing up of masses of solid matter.

For these reasons we set aside the convictions in this case and order refund of the fines.

## No. 9.

*Before Hon. Mr. Justice Shah Din.*

GANESHI LAL,—(ACCUSED),—PETITIONER,

*Versus*

SHUGAN CHAND,—(COMPLAINANT),—RESPONDENT.

Criminal Revision No. 1232 of 1909.

*Act XIII of 1859, section 2.—Applicability of—Advance made to workman by way of loan—Construction of Act.*

*Held*, that the provisions of Act XIII of 1859 can only apply to the case of a workman who has received an advance of money *on account of work*, which he has contracted to perform; and they do not apply to a case in which the workman has only received a loan from his employer, without any reference to his wages for the work which he has agreed to perform—Also that the Act being of a penal nature has to be construed strictly.

*Ram Prasad v. Dirgpal* <sup>(1)</sup> and *Queen-Empress v. Rajab* <sup>(2)</sup> followed.

*Case reported by A. E. Martineau, Esquire, Sessions Judge, Delhi Division, dated 29th September 1909.*

The accused, on conviction by E. Burdon, Esquire, exercising the powers of a Magistrate of the first class in the Delhi District, was directed, by order, dated 27th August 1909, under section 2 of Act 13 of 1859, to return to his work with the complainant, and carry out the work in accordance with the terms of his contract, in default, to be dealt with under section 3 of Act XIII of 1859.

*The proceedings are forwarded for revision on the following grounds :—*

I agree with the Magistrate in holding that the accused is an artificer within the meaning of Act XIII of 1859, and that the dismissal of the former case brought against him is no bar to the present case. But I doubt whether the contract between the parties is one falling under the Act.

By the contract, dated the 21st July 1908, Ganeshi Lal agreed to work for Shugan Chand as his servant for five years at Rs. 40 a month, the wages to be paid monthly. He also received from Shugan Chand a sum of Rs. 300 for payment to Fakir Chand and Ragnath Das and other expenses, which advance he agreed to repay by instalments of Rs. 15 a month. It was further agreed, that if he left before the five years expired, he would

<sup>(1)</sup> (1881), I. L. R. 3 All. 744.<sup>(2)</sup> (1892) I. L. R. 16 Bom. 368



be liable to pay compensation in addition to the amount of the advance he had received, and that Shugan Chand could take proceedings under Act XIII of 1859. Shugan Chand has not been examined, but only the statement of Ganeshi Lal has been taken. It is not stated in the agreement that the Rs. 300 were advanced on account of the work which Ganeshi Lal was to perform for Shugan Chand. On the contrary it is distinctly stated that the money is taken for payment to Fakir Chand and Rugnath Das and for other expenses.

(It would appear that Ganeshi Lal had formerly worked for Fakir Chand and Rugnath Das, and owed them money on that account).

Another thing to be observed is, that the agreement does not provide for the amount of the advance to be deducted from Ganeshi Lal's wages.

It appears to me, that it cannot be said (at all events in the absence of the complainant's statement or other evidence) that the Rs. 300 were advanced to Ganeshi Lal on account of the work he had contracted to perform for Shugan Chand.

I accordingly forward the record to the Chief Court, and recommend either that the Magistrate's order directing Ganeshi Lal to perform his work be set aside, or that further enquiry may be made. I may add that the accused expresses his readiness to repay the Rs. 300 at once, and has brought the money to Court.

The order of the learned Judge was as follows :—

10th Dec. 1909.

SHAH DIN, J.—For the reasons given by the learned Sessions Judge, in which I concur, I hold that the contract between the parties, as evidenced by the agreement, dated the 21st July 1908, does not fall within the purview of Act XIII of 1859, and that the order passed by the Magistrate under that Act is bad in law.

The provisions of the Act in question can only apply to the case of a workman, who has received from his employer an advance of money on account of any work which he has contracted to perform ; they do not apply to a case, like the present in which the workman concerned has only received a loan from his master or employer, without any reference to his wages for the work which he has agreed to do, and which loan has to be repaid by monthly instalments extending over a certain period without any deductions being made from the wages in respect of those instalments.

The case before me is very similar to the one reported as *Ram Prasad v. Dirgpal* <sup>(1)</sup> in which Oldfield, J. observes as follows :—

“ There must be a contract for work, and the money must  
 “ have been received in advance on account of the work to be per-  
 “ formed. In this case it appears that the complainant employs  
 “ workmen as engravers on brass ; and he alleges that the accus-  
 “ ed received from him certain sums on the agreement that they  
 “ would work for him, and for no other person, until they have  
 “ repaid the money, and that they have broken the contract by  
 “ leaving his employment. It appears that the money was given  
 “ them as a loan, and without any reference to the wages or pay-  
 “ ment for the work they performed, which was to be paid for at  
 “ a certain rate, without any deduction on account of the money  
 “ they had received, and as a matter of fact no deduction from  
 “ the wages was ever made. The money they received, therefore,  
 “ cannot be said to have been an advance made on account of any  
 “ work contracted to be performed ; it was not to be considered  
 “ as the payment for any work. The contract was nothing more  
 “ than for a loan of money, to which was attached a condition  
 “ that the borrowers, in consideration of receiving the loan, should  
 “ work for the complainant and not transfer their services else-  
 “ where until they repaid the money. This was something quite  
 “ different from any contract which the Act contemplated.”

The terms of the contract in the present case are identical, for all practical purposes, with those of the contract in the Allahabad case, and I have no hesitation in agreeing with the view of the law as embodied in the above observations.

A Division Bench of the Bombay High Court adopted the same view in the case of *Queen-Empress v. Rajab* <sup>(2)</sup>, and it is noteworthy that some of the terms of the contract in the Bombay case, as set out at page 368 are the same as those of the contract entered into between the parties in this case. At page 372 of the report the learned Judges say :—

“ The written contract sued upon \* \* \* does not allude to  
 “ any advance. On the contrary, it stipulates very plainly that  
 “ the accused workman is to receive wages for his work as they  
 “ accrue due : and it provides that he is to take a receipt for any  
 “ money he may repay \* \* \*  
 “ The case appears to be on all fours with I. L. R. 3 All. 744,

(1) (1881) 1. L. R. 3 All. 744.

(2) (1892) I. L. R. 16 Bom. 366.

"in re Ram Prasad, and to fall within the principle of *Reg. v. Jethya* (9 B. H. C. R. 171)."

The Act (XIII of 1859) being of a penal nature has to be construed strictly, and it applies only to cases where there has been an advance of money on account of any work which has been contracted to be performed (see also *Fazal Din v. The Empress* (1) ).

For the above reasons, I agree with the learned Sessions Judge in holding that the present case does not fall within the scope of Act XIII of 1859, and I set aside the order of the Magistrate, which is *ultra vires* and bad in law.

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### No. 10.

*Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Shah Din.*

DR. JAIKISHEN DAS,—(COMPLAINANT),—PETITIONER,

*Versus*

SHER SINGH, — (ACCUSED),—RESPONDENT.

Criminal Revision No. 1543 of 1908.

*Defamation—Indian Penal Code, Act XLV, of 1860, section 499—Communication to complainant's pleader—"Publication."*

Accused in reply to a notice from complainant's pleader calling upon him to pay money lent to him by complainant wrote a letter to the pleader containing defamatory statements about the complainant. The complainant thereupon charged the accused with defamation. The lower Courts held that the letter having been sent to the complainant's pleader must be considered to have been addressed to the complainant himself and therefore there was no publication to a third person. On revision to the Chief Court :—

*Held*, that as the defamatory statements contained in the accused's letter to the complainant's pleader were wholly irrelevant to, and unconnected with, the question of the alleged loan mentioned in the pleader's letter, the pleader must be held, to be a third person as far as these statements are concerned, and that, therefore, there had been publication within the purview of section 499 of the Indian Penal Code.

*Petition under section 439, Criminal Procedure Code, for revision of the order of Major A. A. Irvine, Sessions Judge, Lahore Division, dated the 31st August 1908.*

Hukam Chand, for petitioner.

Kharak Singh, for respondent.



The judgment of the Court was delivered by—

SHAH DIN, J.—The facts of this case are correctly stated in the order of the learned Sessions Judge, and are briefly as follows :— 25th Jan. 1910.

In the year 1905 the respondent Sher Shingh, who was then a senior auditor in the office of the Examiner of Local Fund Accounts, wrote a confidential report alleging acts of dishonesty in connection with certain contracts on the part of the petitioner, Dr. Jaikishen Das, who was then an *ex officio* member of the Kalka Municipal Committee. No actual embezzlement of public money seems to have been imputed to the petitioner in the confidential report aforesaid; and it would appear from a letter on the record, dated the 7th April 1908, from the Accountant-General, Punjab to the District Magistrate, Lahore, that the official audit note, written by an auditor other than the respondent, contains no reference to any alleged embezzlement by the petitioner. The Examiner would seem to have disagreed with much of what the respondent stated in his confidential report which was rejected and cancelled by the Examiner.

On the 9th February 1908, Lala Hukam Chand, pleader, under instructions from the petitioner, Dr. Jaikishen Das, sent a registered notice to the respondent Sher Singh, demanding repayment of a loan of Rs. 500 alleged to be due to the petitioner from the respondent and informing him that in the event of the respondent failing to comply with the notice a suit for the recovery of the aforesaid amount will be instituted. In reply to this notice the respondent sent a letter, dated the 20th February 1908 to Lala Hukam Chand, in which he denied having borrowed any money from the petitioner or owing him anything at all, and at the same time referred in some detail to the allegations that had been made by him in the confidential report mentioned above regarding acts of dishonesty on the part of the petitioner, when the latter was an *ex officio* member of the Kalka Municipal Committee. The respondent went on to remark that Dr. Jaikishen Das was inimically disposed towards him because of that confidential report and suggested enmity as the reason for a false claim being preferred against him.

The petitioner, Dr. Jaikishen Das, has brought a criminal prosecution against the respondent upon a charge of defamation, under section 500, Indian Penal Code, alleging that the re-

spondents' reply, dated the 20th February 1908, to his pleader's notice, dated the 9th February 1908, contains defamatory statements concerning himself. The learned District Magistrate, in whose Court the trial was held, has dismissed the petitioner's complaint on the ground that as the petitioner's pleader, to whom the alleged defamatory letter of the 20th February 1908 was sent by the respondent, was, for the purposes of the correspondence in question, identified with the petitioner, being his agent and attorney, the letter must be considered as having been addressed to the petitioner himself; and that, therefore, there was no "publication" of the alleged defamatory statements contained in the aforesaid letter to a third person such as would harm the reputation of the petitioner within the purview of section 499 of the Indian Penal Code. The petitioner filed an application for revision of the District Magistrate's order in the Court of Session, but the learned Sessions Judge has also agreed in the view taken by the District Magistrate, holding that there has been no "publication" of the defamatory matter complained of as required by section 499 of the Indian Penal Code, and has dismissed the application.

In revision the question whether there has or has not been a "publication" of the defamatory matter contained in the letter of the 20th February 1908 has been argued before us at some length, and after giving our best consideration to the arguments advanced on both sides we are of opinion that the question must be answered in the affirmative. Before proceeding with the discussion of the question of law involved, it would be as well to reproduce here the material portions of the letter which forms the subject of prosecution.

It runs as follows :—

" Dear Sir,

In reply to the notice, dated the 9th February 1908, I state as follows :—

" I inspected the accounts of Kalka Municipal Office as  
 " senior auditor from the 15th to 31st May 1905. In the course  
 " of the audit embezzlements to the extent of about Rs. 1,000  
 " were discovered in the accounts for the year 1904-05. These  
 " embezzlements were committed by Dr. Jaikishen Das, the senior  
 " officer at Kalka. I sent a report regarding the embezzle-  
 " ments to the Examiner of Local Fund Accounts who went to  
 " Kalka on the 31st May 1905 and inspected all the papers and  
 " bills. \* \* \* \* In the course

“ of the audit the statements of 27 men were recorded by the  
 “ *Tahsildar* of Kalka. All these statements showed dishonesty on  
 “ the part of the Doctor. I stated in my report that during the  
 “ last six years he must have embezzled about Rs. 6,000 from the  
 “ Kalka Municipal Fund. \* \* \* \* \*  
 “ On my report the Doctor was transferred from Kalka. \*  
 “ \* \* \* \* \* My report was subsequently  
 “ printed and sent to the local officers. I discharged my official  
 “ duties honestly and this is the reason why Dr. Jaikishen Das  
 “ is inimically disposed towards me. I owe him no money,  
 “ nor did I borrow any money from him. \* \* \* \* \*  
 “ My reports against him (the Doctor) are forthcoming in the  
 “ office of the Examiner. The local authorities taking pity on the  
 “ Doctor on account of his old age were content with his trans-  
 “ fer only. In fact, I in my report and also the Examiner  
 “ recommended that he (the Doctor) should be criminally  
 “ prosecuted. The papers on this behalf are forthcoming in  
 “ the office of the Examiner.”

The most striking feature of the above letter is the too brief and evasive reference to the petitioner's demand for repayment of the alleged loan of Rs. 500 and the utter irrelevancy, so far as that demand was concerned, of the charges of embezzlement and dishonesty prominently brought forward against the petitioner. The respondent's explanation to the effect that he wrote the reply in question with the intention of deterring the petitioner from bringing a suit in respect of a claim which was absolutely unfounded and from incurring unnecessary expense in a Court of law, has been held by the District Magistrate and the Sessions Judge to be unsatisfactory, and we agree in that view. The gratuitous character of the charges paraded in the above communication is too patent for it to be treated as a justifiable protest against a baseless claim; and the learned District Magistrate has rightly observed that the said communication is *primâ facie* defamatory unless it falls within one of the exceptions to section 499 of the Indian Penal Code, provided that the imputations contained therein were “ made or published ” with the intention or knowledge specified in the aforesaid section.

As regards the question of publication we take it as settled law, that the communication of defamatory matter concerning a particular person to that person only is not publication within the purview of section 499 of the Indian Penal Code. *Queen-Empress v. Taki Husain* <sup>(1)</sup>, *Queen-Empress v. Sadashiv* <sup>(2)</sup>,

<sup>(1)</sup> (1884) I, L, R, 7 All, 205, F. B.      <sup>(2)</sup> (1894) I, L, R, 18 Bom. .



*Bishwanath Das v. Keshab Gandha Banik* (1). The question for decision in the present case therefore resolves itself into this, whether the sending of the letter, dated the 20th February 1908 by the respondent to the petitioner's pleader in reply to the notice sent by the latter, could be regarded, for the purposes of section 499 of the Indian Penal Code, as the sending of that letter to the petitioner himself, so that no imputation concerning the petitioner could be said to have been "made or published" with the result of harming his reputation "in the estimation of others" within the meaning of Explanation 4 to that section. Though there is no Indian decision directly in point, there is ample authority both in England and in America, in support of the view that, in circumstances similar to those of the present case, the attorney or solicitor of the complainant is not absolutely identified with him, and that sending a libellous letter containing imputations concerning the complainant to such attorney or solicitor is sufficient publication to a third person. See Odgers on Libel and Slander, 4th edition (1905), pp. 154, 288, 344; *Tuson v. Evans* (2), *Huntley v. Ward* (3), *Stevens v. Kitchener* (4), Cooley on Torts, 3rd edition, Vol. I, pp. 367—368; *Alabama and Vicksburg Railway Company v. Brooks* (5).

The statements made by the respondent in his letter of the 20th February 1908 and which are complained of by the petitioner as being defamatory were, as we have already said wholly irrelevant to, and unconnected with, the question of the alleged loan of Rs. 500, in respect of the repayment of which the petitioner had, through his pleader, sent to the respondent the notice, dated the 9th February 1908; and that being so, we are of opinion that, so far as those statements are concerned, the petitioner's pleader was a third person, to whom the statements in question were "published" by the respondent within the purview of section 499, Indian Penal Code. In connection with this aspect of the case, we may with advantage quote certain observations made by Lord Denman, C. J. in *Tuson v. Evans* (2) which seem to us to be most apposite to the question under consideration:— "Any one, in the transaction "of business with another," says his Lordship, "has a right to "use language *bona fide*, which is relevant to that business, and "which a due regard to his own interest makes necessary, even

(1) (1902) 7 C. W. N. 74 and (1903) 1 L. R. 30 Cal. 402.

(2) 12 A. and E. 733

(3) 6 C. B. N. S. 514.

(4) (1887) 4 Times L. R. 159.

(5) 30 Am. St. Rep. 528.

"if it should directly, or by its consequences, be injurious or  
 "painful to another; and this is the principle on which  
 "privileged communication rests; but defamatory comments  
 "on the motives or conduct of the party with whom he is deal-  
 "ing do not fall within that rule. It was enough for the  
 "defendant's interest, in the present case, to deny the truth of  
 "the plaintiff's assertion: to characterise that assertion as an  
 "attempt to defraud, and as mean and dishonest, was wholly  
 "unnecessary."

The case of *Boxius v. Goblet Freres* <sup>(1)</sup> relied on by the learned Sessions Judge in support of his view is not in point, for all that that case lays down is, that if a solicitor, writing a letter on a privileged occasion on behalf of a client, dictates it in the ordinary course of business to a clerk in his office and gives it to another clerk in his office to be copied, that is not a publication. Where, however the circumstances are different, that is to say, where the writer of the letter shows it to his clerk otherwise than in the ordinary course of business, there the occasion of the publication is not privileged and the publication must be deemed to be to a third person. See *Pullman v. Hill and Co.* <sup>(2)</sup>, at page 527; also Odgers on Libel and Slander (4th edition) pages 284, 286. "A man is entitled to act on a privileged occasion in whatever way is  
 " 'reasonably necessary and usual' in such circumstances.  
 "And if, in so acting, he reasonably employs methods which,  
 "in the ordinary course of business, involve a minor and  
 "technical publication of the defamatory matter, ancillary to  
 "the main publication which is privileged, such minor  
 "publication is also privileged." The same principle has been laid down in the recent case of *Edmondson v. Birch and Co., Ltd., and Horner* <sup>(3)</sup>. Lord Collins, M. R., in the course of his judgment in that case observes at page 380: "where there  
 "is a duty, whether of perfect or imperfect obligation, as  
 "between two persons, which forms the ground of a privileged  
 "occasion, the person exercising the privilege is entitled to  
 "take all reasonable means of so doing, and those reasonable  
 "means may include the introduction of third persons where  
 "that is reasonable and in the ordinary course of business, and  
 "if so it will not destroy the privilege." To a similar effect are the remarks of Lord Justice Fletcher Moulton at page 382: "If a business communication is privileged as being  
 "made on a privileged occasion, the privilege covers all

<sup>(1)</sup> (1894) 1, Q. B. 842.

<sup>(2)</sup> 1, Q. B. 524.

<sup>(3)</sup> 1, K. B. 371.

“ incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business.” Where, therefore, in the ordinary course of business of a company or mercantile firm it is reasonably necessary that a document should be copied into a copy letter book or telegram book, the privilege is not lost.

The circumstances of the present case are, however, wholly different; and we find it somewhat difficult to follow the learned Sessions Judge in his view that this case is the converse of the case of *Boxius v. Goblet Freres* (1), and that so far as the question of publication to a third person is concerned, the principle enunciated by the Court of Queen’s Bench in that case governs the case before us.

In the American case of *Alabama and Vicksburg Railway Company v. Brooks* (2), it was held that where a person, to whom a claim is presented by attorneys on behalf of their client, in replying exceeds his privilege by sending to the attorneys a letter containing defamatory statements concerning the client, the publication is complete when the letter is received and read by the attorneys. Cooper, J. in the course of his judgment observes at page 523 : “ The publication was complete when the libellous letter was received and read by Messrs. Dabney and McCabe, the plaintiff’s attorneys. This necessarily follows from the establishment of the fact, settled by the verdict, that the defamatory statement was not covered by the privilege of the communication. The letter from the attorneys called for any lawful reply from the officers of the defendant, but it did not invite any malicious defamation of their client; and the defendant’s Superintendent, by exceeding the privilege, deprived his principal of any defence it might have had, if he had kept within it.”

The contention of the petitioner’s pleader as regards the question of “ publication ” receives some support, by way of analogy, from the case of *Wennhak v. Morgan* (3), in which it was held that sending a defamatory letter to a wife about her husband is sufficient publication. In accordance with the well-known principle of the English Common law that husband and wife are one person, the uttering of a libel by a husband to his wife is no publication (*Wennhak v. Morgan*) (4). For many purposes they are, however, essentially different persons,

(1) (1894) 1 Q. B. 842.  
(2) 30 Am. St. Rep. 528.

(3) 22 L. J. C. P. 190.  
(4) L. R. 22 Q. B. D. 635.



and among others, for the purpose of having the honour and feelings of the husband assailed and injured by acts or communications made to the wife. As Maule, J., observes in the above case :— “ No doubt man and wife are, in the eye of the law, for many purposes, one person, and for many purposes different persons ; and I think that, for the purpose of having his feelings injured by communications made to his wife, the husband is a different person from the wife, and that being so, there was sufficient publication of the libel in this case (to a third person). ”

For the foregoing reasons we hold that the communication by the respondent of the alleged defamatory matter contained in the letter, dated the 20th February 1903, to the petitioner's pleader was tantamount to “ publication ” to a third person within the purview of section 499, Indian Penal Code, and we accordingly set aside the order of the District Magistrate dismissing the petitioner's complaint and send the record back with a direction that the respondent's trial be proceeded with in accordance with law.

*Revision accepted.*

### No. 11.

*Before Hon. Mr. Justice Robertson and Hon. Mr.*

*Justice Johnstone.*

THE KING-EMPEROR,—PETITIONER,

*Versus*

ALI,—(ACCUSED),—RESPONDENT.

Criminal Revision No. 907 of 1909.

*Criminal Procedure Code, Act V of 1898, sections 6, 156 and 193—Power of Sessions Judge to direct enquiry by Police.*

*Held*, that as section 156 of the Criminal Procedure Code only gives power to a Magistrate empowered under section 190 to order an investigation by the Police, an order by a Sessions Judge directing the Police to make further enquiry under this section is *ultra vires*.

*Case taken up by the Court on its own motion under section 435, Criminal Procedure Code.*

Sheo Narain, for Government Advocate.

Respondent—*Nemo*.

Order of the Chief Court was delivered by—

ROBERTSON, J.—The question in this case is a very simple

one.

25th Jan. 1910,

In an order, dated 13th March 1909, the Sessions Judge of Shahpur has recorded the following order :—

“ I direct the police to make further enquiry into his conduct under section 156, Criminal Procedure Code.”

The question is whether or not a Sessions Judge can issue such an order, or whether it is not *ultra vires*.

We have no doubt that the order was *ultra vires*. Such an order could only be issued under some provision of the law. The law relating to the matter is to be found in the Code of Criminal Procedure. Section 6 of the Code specifies the classes of Criminal Courts in British India as follows :—

“ Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely—(1) Courts of Session, (2) Presidency Magistrates, (3) Magistrates of the first class, (4) Magistrates of the second class, (5) Magistrates of the third class.” Section 156 only gives power to “ any Magistrate empowered under section 190 may order such an investigation as above mentioned.” A Court of Session is under section 6 clearly a Court quite differentiated from the Court of a Magistrate. Section 193 also *inter alia* makes this quite plain. A Sessions Court is not a Magistrate empowered under section 190. No other section or provision of the Code gives a Sessions Court power to order such an enquiry. Consequently the order was *ultra vires*, and is set aside accordingly.

### No. 12.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and  
Hon. Mr. Justice Rattigan.*

GANESHA SINGH,—COMPLAINANT,

*Versus*

KARAM DIN AND SHARAF DIN,—ACCUSED.

Criminal Revision No. 759 of 1909.

*Jurisdiction—Offences under Act XIII of 1859—place of trial.*

*Held*, following *Mana Lal v. Nahia* <sup>(1)</sup>, that proceedings under Act XIII of 1859 can be instituted either in the Court of the Magistrate within the limits of whose local jurisdiction the defendant resides or in a Court within whose local limits the refusal to perform the contract has taken place, but not in a Court within whose local limits the contract was made.

*Case reported by Q. Q. Henriques, Esquire, District Magistrate,  
Jhang, dated the 17th June 1909.*

<sup>(1)</sup> 17 P. R. 1896, Cr.

Tek Chand, for complainant.

Muhammad Shafi and Shah Nawaz, for accused.

*The facts of this case are as follows :—*

The accused took some money in advance from the complainant, first of all in the Jhang and then in the Shahpur district, and undertook to perform some work under him. They however left the work which was to be carried out in the Jhelum district without completion and without paying the balance due from them.

The accused, on trial by Lala Maya Ram, exercising the powers of a Magistrate of the 1st class in the Jhang district, were discharged by order, dated 31st May 1909.

*The proceedings are forwarded for revision on the following grounds :—*

No offence has been committed until the Magistrate has passed an order under Act XIII of 1859 directing work to be done or repayment to be made. I think it is clear that jurisdiction clearly lies within the district in which the contract was made (*Lal Mohan Chowbey v. Hari Charan Das Bairagi* <sup>(1)</sup>). The matter to be referred to Chief Court for revision under section 438, Criminal Procedure Code.

The order of the Chief Court was delivered by—

RATTIGAN, J.—The facts as stated in the order of reference are as follows :—The proceedings are under Act XIII of 1859 and were taken in the Court of a Magistrate of the 1st class in the Jhang district against the accused, who were workmen employed by the complainant. The order proceeds :—"The accused took some money in advance from the complainant, first of all in the Jhang and then in the Shahpur district and undertook to perform some work under him. They however left the work which was to be carried out in the Jhelum district without completion and without paying the balance due from them." It is admitted that the contract between the parties was made at Maghiana in the Jhang district, that the respondents (the workmen) are residents of the Jhelum district, and that the refusal to perform the contract (whether such refusal was justifiable or wrongful) took place in the latter district.

2nd Feb. 1910.

The complaint was filed in the Court of the Magistrate, 1st Class, Jhang district, and the Magistrate apparently took

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(<sup>1</sup>) (1898) I. L. R. 25 Cal. 627.



action under section 1 of Act XIII of 1859. The "accused" persons duly appeared before him, and pleaded that his jurisdiction did not extend over them as they were residents of another district and their refusal to perform their contract took place in the latter district. The Magistrate accepted this contention and discharged the respondents. The District Magistrate is of opinion that this order is erroneous on the ground that "no offence has been committed until the Magistrate has passed an order under Act XIII of 1859, directing work to be done or repayment to be made," and in support of his opinion he relies on *Lal Mohan Chowbey v. Hari Charan Das Bairagi* <sup>(1)</sup>.

It has been held by this Court in *Mana Lal v. Nahia* <sup>(2)</sup> that proceedings under the Act can be instituted either in the Court of the Magistrate within the limits of whose local jurisdiction the defendants reside or in a Court within whose local limits the refusal to perform the contract has taken place. We entirely agree with this pronouncement of the law and also with the observations of the learned Judges that the Legislature clearly did not intend, that an employer should be compelled to run about after his defaulting employee and take action against him only in such place as he might at the moment happen to be. But we see no reason for further extending the privilege given to the employer of choosing his venue. Presumably the place where he is doing his work is a place not inconvenient to him, and we think that his convenience is sufficiently secured when he is given the option of taking proceedings against his workmen, not only in the district wherein they may be residing but also in the district in which the refusal to carry out their engagements may have occurred. Proceedings under Act XIII of 1859 are of a quasi-criminal nature and in the ordinary course the trial of a complaint under that Act should take place in the district where the offence occurred (section 177, Criminal Procedure Code). While concurring, as above observed, in the proposition that the complaint can be inquired into also within the district in which the defendants are residing, we do not feel justified in going further and in holding that the Courts of Magistrates, in whose districts the contract was made, are also empowered to act under Act XIII of 1859. The ruling of the Madras High Court in *Gregory v. Vada Kasi Kangani* <sup>(3)</sup> is here

<sup>(1)</sup> (1898) *I. L. R.* 25 Cal. 637.

<sup>(2)</sup> 17 P. R. 1896, Cr.

<sup>(3)</sup> (1886) *I. L. R.* 10 Mad. 21.

directly in point and is in favour of the respondents' contention.

The learned pleader for the complainant has referred us to certain rulings in which it has been held, that the mere breach of the contract is not an offence under Act XIII of 1859 and that the offence consists in the failure or refusal to comply with the Magistrate's order passed under the provisions of that Act, (*King-Emperor v. Takasi Nukayya* <sup>(1)</sup>), *In the matter of Anusoori Sanyasi* <sup>(2)</sup>, *In the matter of Ram Sarup Bhakat* <sup>(3)</sup>. But these rulings are not apposite to the point before us, which is whether a Magistrate has jurisdiction to entertain a complaint simply because the contract was made within the local limits of his jurisdiction. Assuming however, that they are *pro tanto* relevant, we fail to see how they can assist the complainant's case. Upon the principle enunciated in them, the offence consists in the refusal to comply with the Magistrate's order under section 2 of the Act. This order is to the effect that the workman shall either repay the money advanced to him or perform the work, and in the ordinary course of things (if the workman does not comply with the terms of the order) his disobedience occurs, either at the place where he is residing or at the place where the work has to be performed.

The case of *Lal Mohan Choubey v. Hari Charan Das Bairagi* <sup>(4)</sup> is quoted as being in favour of complainant's contention, but it is clear from the statement of facts that both complainant and respondent were at the time residents in Calcutta where the complaint was preferred. All that the High Court decided was, that the terms of section 1 of the Act "do not imply that the complaint is to be made to the Magistrate of Police in the place where the breach has taken place," and as the respondent was actually resident in Calcutta, there would seem to be no reason why proceedings should not be taken against him in that place. This is exactly in accordance with the ruling of this Court in the case above cited. In our opinion the order of the Magistrate, 1st class, Jhang, was correct and we see no reason to interfere with it. It will however be open to complainant to take proceedings against respondents in the proper Court, should he be so advised.

<sup>(1)</sup> (1901) *I. L. R.* 24 *Mad.* 660.

<sup>(2)</sup> (1905) *I. L. R.* 28 *Mad.* 37.

<sup>(3)</sup> (1900) 4 *C. W. N.* 253.

<sup>(4)</sup> (1898) *I. L. R.* 25 *Cal.* 637.

## No. 13.

*Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Williams.*

THE CROWN,—COMPLAINANT,

*Versus*

NIADAR SINGH,—ACCUSED.

Criminal Revisions Nos 1558 and 1619 of 1908.

*Excise Act, XII of 1896—Police officer invested with powers under section 44 not competent to lay complaint under section 57.*

*Held, following Pirag v. Queen-Empress (1) that Police officers invested with powers under section 44 of the Excise Act, 1896 can only be treated as Excise officers for the purposes of sections 36, 37 and 38, and consequently a Police officer so empowered is not an Excise officer within the meaning of section 57 competent to make a complaint or report of an offence punishable under section 49 or 52.*

*Case reported by H. A. Rose, Esquire, Sessions Judge, Ambala Division, dated the 18th November 1908.*

*The facts of this case (No. 1558) are as follows :—*

One Ali Bakhsh, Head Constable No. 614, noticed a man, Nikka, coming from the direction of Abkari. He noticed that Nikka avoided the constable's gaze. This raised the constable's suspicion. He searched Nikka and found that Nikka was concealing a bottle containing liquor. Nikka ran away. He was then arrested by the police and on being questioned stated, that he had purchased the liquor from the contractor, who had directed him not to go by the ordinary road as he would be arrested if seen carrying liquor. Accordingly the police charged Niadar Singh, contractor, with a breach of condition of license in allowing liquor to be carried off his premises.

*The facts of case (No. 1619) are as follows :—*

The Sub-Inspector Police, Kasauli reported to the Cantonment Magistrate that Niadar Singh, contractor, sold country-made liquor to one Nanbai, Dhobi and that he thereby committed breach of the conditions of his license by selling liquor off his premises which was forbidden in the cantonment.

The accused, on conviction by Lieutenant-Colonel A. J. H. Newnham, Cantonment Magistrate, exercising the powers of a Magistrate of the 1st class in the Ambala district, was sentenced by order, dated 5th May 1908, under section 49



of the Excise Act, to a fine of rupee one only (in case No. 1558) and rupees ten (in case No. 1619.)

*The proceedings are forwarded for revision on the following grounds :—*

I am of opinion that revision in these two cases must be allowed on the ground that the prosecutions were not instituted on the reports of an Excise officer. No Police officer has been appointed an Excise officer in the Ambala district, and the Police officers appointed by the Punjab Government Notifications under section 44 of the Excise Act had no authority to report offences except such as fall under sections 36, 37 and 38. Hence the rulings *Queen-Empress v. Sundar Singh* <sup>(1)</sup> and *Motan Das v. The Emperor* <sup>(2)</sup> do not apply, and as in the Criminal Revision No. 1601 of 1897, of which I have obtained a copy (see specially the top of page 6) these prosecutions must be held to have been illegal. The Collector also agrees in my view and I recommend revision in both cases to Chief Court.

The order of the learned Judge, who referred the cases to a Bench, was as follows :—

SHAH DIN, J.—As at present advised, I think that the view which the learned Sessions Judge has taken in this case is correct. Niadar Singh, a licensed seller of liquor in the Kasauli Cantonment, has been charged with a breach of condition of license in selling liquor and allowing it to be carried off his premises, and has been convicted under section 49 of Act XII of 1896 on the report of a Head Constable. 13th April 1909.

The question for decision is, whether for purposes of this prosecution the Head Constable who made the report to the Magistrate was an Excise officer within the meaning of section 57 of the Act. The Sessions Judge thinks that he was not, and I am disposed to agree with him. Niadar Singh is a holder of Bazar license, Form I, the third condition of which is that "all spirit sold must be consumed on the premises"—and it is with a breach of this condition that he has been charged, the person to whom he sold liquor having carried it off the premises. The offence which has thus been committed falls within section 49 or possibly within section 52 of the Act. That being so, I think

<sup>(1)</sup> 8 P. R. 1901, Cr.

<sup>(2)</sup> 9 P. R. 1903, Cr.

that the case is not governed by the decisions of this Court, reported as *The Empress v. Chet Singh* <sup>(1)</sup> and *Queen-Empress v. Sunder Singh* <sup>(2)</sup> but is analogous to *Pirag v. Queen-Empress* <sup>(3)</sup> and must be decided in accordance with the principle laid down therein. Under the Punjab Government Notification No. 7352, dated the 26th March 1885, issued under section 44 (1) of Act XII of 1896, a Head Constable is invested with powers conferred on Excise officers by sections 37 and 38 of the Acts, and under section 44 (2) such Police officer "shall for all purposes connected with the exercise of these powers, be deemed to be an Excise officer within the meaning of the Act." Now, the offence committed by the accused person in *The Empress v. Chet Singh* <sup>(1)</sup> was one "in connection with section 37 of the Act" (p. 51, para. 2), and similarly the offence dealt with in the later decision, *Queen-Empress v. Sunder Singh* <sup>(2)</sup> was one falling within section 45 of the Act, in connection with which powers of arrest and seizure could be and were as a matter of fact, exercised by the Police officer concerned under section 38.

In the present case, as in the case reported as *Pirag v. Queen-Empress* <sup>(3)</sup>, both bring prosecutions for breaches of conditions of license by licensed sellers of liquor, no offence, such as is connected with either section 37 or section 38, has in my opinion been committed, and the Head Constable who made the report (without at all attempting to arrest the accused Niadar Singh) did not, as I think he clearly could not, exercise any of the powers conferred on Excise officers under either of the sections aforesaid (see *Pirag v. Queen-Empress* <sup>(3)</sup>)—p. 23, para. 2—and *The Empress of India v. Chet Singh* <sup>(1)</sup> (p. 51, para. 2).

*Pirag v. Queen-Empress* <sup>(3)</sup> was a case of a breach of the second condition of the Bazar license, Form I, while the present case arises out of a breach of the third condition of a similar license.

The law applicable to both cases, so far as a complaint or report made under section 57 of Act XII of 1896 is concerned, must therefore be the same. In my opinion neither section 37 nor section 38 of the Act applies to this case, and for purposes of making a report to a Magistrate the Head Con-

<sup>(1)</sup> 22 P. R. 1900, Cr.

<sup>(2)</sup> 8 P. R. 190, Cr.

<sup>(3)</sup> 9 P. R. 1897, Cr.

stable was not an Excise officer within the meaning of section 44 (2) and section 57 of the Act.

As however the question raised in this case is one of some importance, and for which the learned Government Advocate is anxious to have an authoritative ruling, I think it should be decided by a Division Bench, and I refer it accordingly.

The Order of the Division Bench Court was delivered by—

WILLIAMS, J.—The facts of this case sufficiently appear from the order of reference and the question before us for decision is, whether a Police officer who has been invested under section 44 of the Excise Act, 1896 (XII of 1896) with the powers conferred upon Excise officers by sections 36, 37 and 38 of the Act, is an Excise officer within the meaning of section 57, so as to be competent to make a complaint or report of an offence punishable under sections 49 or 52 of the Act. For the reasons indicated in the order of reference and more fully set forth in Mr. Justice Chatterjee's judgment reported as *Pirag v. Queen-Empress* <sup>(1)</sup> we have no hesitation in holding that Police officers invested with powers under section 44 can only be treated as Excise officers for purposes connected with the exercise of the very limited powers thereby vested in them, and that the prosecution of a liquor-seller for a breach of the conditions of his license cannot be brought within those purposes. Incidentally this view of the law has already by implication received the approval of a Division Bench of this Court for in *The Empress of India v. Chet Singh* <sup>(2)</sup> the learned Judges referred to the case of 1897 in the following terms:—"There, the offence was under section 52 for breach of rules of license with reference to which Police officers have received no powers as Excise officers and had no authority to report." It follows therefore that with reference to such breaches a Police officer empowered under section 44 would not be competent under section 57 to lay a complaint. We accordingly accept this application and quash the proceedings taken in the Cantonment Magistrate's Court as having been initiated without proper authority. The fine, if realized, will be refunded.

A similar order will be passed in Criminal Revision Case No. 1558 of 1908, in which the circumstances are identical.

<sup>(1)</sup> 9 P. R. 1897, Cr.

<sup>(2)</sup> 22 P. R. 1900, Cr.



## No. 14.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon. Mr. Justice Rattigan.*

IN THE MATTER OF THE APPEALS OF BISHEN  
DAS AND OTHERS.

Miscellaneous Criminal Case No. 17 of 1910.

*Appeal from order of Superintendent, Hill States, Simla, in trial conducted by him in Bashahr State outside British India.*

*Held*, that no appeal lies to the Chief Court from an order of the Deputy Commissioner of Simla in a trial conducted by him in his capacity as Superintendent of Hill States outside the limits of British India.

*Criminal Reference.*

Government Advocate, for Crown.

Parker and Shadi Lal, for convicts.

The order of the Court was delivered by—

15th March 1910.

RATTIGAN, J.—It is alleged for the prosecution that one Ram Saran on the 24th August 1909 attempted to murder Mr. A. J. Gibson, Deputy Conservator of Forests, by shooting at him with a gun and that certain other persons (to wit, Kasi, Bishan Das, Shama Nand, Thakar Das, Devi Saran, Sewa Ram and Ganga Ram) aided and abetted in the commission of the said offence. The actual scene of the occurrence is said to have been a place within the territory of the Bashahr State, one of the "Hill States of Simla," and outside British India.

It appears that Mr. A. B. Kettlewell, the Deputy Commissioner and District Magistrate of Simla, and as such the *ex-officio* Superintendent of the Hill States of Simla, was deputed by the Local Government, to try the said persons for the offence alleged to have been committed by them. Mr. Kettlewell, in pursuance of these orders, proceeded to Rampur, the capital of the Bashahr State, and there held the trial of the accused persons, with the result that he convicted Ram Saran of the actual attempt on the life of Mr. Gibson, and Bishan Das, Shama Nand, Devi Saran, Sewa Ram, Ganga Ram and Kasi of complicity in the said offence. Ram Saran has been sentenced to 14 years' transportation; Bishan Das to 12 years' transportation; Shama Nand to 10 years' transportation; Devi Saran and Sewa Ram to seven years' transportation; Ganga Ram to four years' rigorous imprisonment and Kasi to three years' rigorous imprisonment.

From this order all the convicts, except Ram Saran and Kasi, have preferred an appeal to this Court, through their respective Counsels, Messrs. Shadi Lal and Parker.

On behalf of the Crown, the learned Government Advocate, Mr. Petman, has urged as a preliminary objection that this Court has no jurisdiction to entertain the appeal on the ground that the trial was held outside the limits of British India and by a person who was a Political Officer, and, when conducting the trial, acting in no sense as a Magistrate Subordinate to this Court.

In reply to a letter addressed to him upon this point by one of the counsel for the accused persons, the Chief Secretary to the Local Government has stated that "the case was tried by the Superintendent, Hill States, Simla, in his capacity of representative of the paramount power, by virtue of which he is vested with a residuary jurisdiction to try cases when political considerations preclude the exercise of the Chief's jurisdiction. In trying the case the Superintendent, Hill States, assumed the authority of the Chief against which there is no appeal to any British Court, as no question of British Indian Law arises."

The last sentence quoted is, we need hardly say, merely an expression of opinion on the part of the Executive authorities and in no sense binding upon us. But we feel bound at the same time to accept as conclusive the statement of the Local Government with regard to the capacity in which Mr. Kettlewell tried those persons. Admittedly the trial occurred at a place beyond the limits of British India, and it seems to us that the mere fortuitous fact that the officer who presided over the trial happened to occupy the post of District Magistrate of Simla, cannot give this Court jurisdiction in a case in which it would otherwise have had no jurisdiction. That in trying those persons Mr. Kettlewell was not acting in his capacity of District Magistrate of Simla is obvious for several reasons. In the first place we have the letter of the Chief Secretary to the Local Government, from which we have already quoted the material passage. In the next place we have three facts (1) that the order is signed by Mr. Kettlewell as "Superintendent, Hill States"; (2) that the trial took place outside the limits of the jurisdiction of the District Magistrate of Simla; and (3) that the sentences awarded to the accused were such that no District Magistrate, as such, has jurisdiction to impose.

Obviously, therefore, Mr. Kettlewell was not acting in his ordinary capacity as a Magistrate under the Criminal Procedure

Code. He was *pro tanto* a person authorised by the Local Government to conduct a trial in foreign territory. He held the trial in that territory, and whether or not his appointment was *intra* or *ultra vires*, is a question upon which we conceive this Court has no power whatever to adjudicate, so far as the present question before us is concerned. We have to consider simply and solely whether an appeal lies to this Court from the order of a person who has (rightly or wrongly) been authorized to conduct a trial outside the limits of British India of persons alleged to have been concerned in a crime outside those limits. Upon this question we have no hesitation in saying that we have no jurisdiction to entertain such an appeal. Mr. Shadi Lal, on behalf of his client Bishan Das, urged that a subject of His Majesty could not be tried in a Native State otherwise than in accordance with the provisions of sections 3 and 4 of the Indian Penal Code, and that consequently in his case, at all events, an appeal must lie to this Court. We cannot accede to this contention. The provisions of the law relied upon by the learned counsel are clearly intended to provide merely that a subject of His Majesty who commits an offence under the Indian Penal Code in foreign territory shall be liable to be punished for the same when he returns to British India. We can find nothing in those sections to preclude the exercise of jurisdiction in Native States over native Indian subjects of His Majesty who have committed offences in those States.

Mr. Shadi Lal further argued that the Superintendent, Hill States, had no jurisdiction to try the accused persons. But even so, and even if we admit (for the sake of argument) that the Superintendent acted illegally, we fail to see how that fact would affect the question before us. We have merely to decide whether or not an appeal lies to this Court from the order passed by Mr. Kettlewell, as Superintendent, Hill States, in a trial conducted by him outside the limits of British India, and upon this question we have no hesitation in saying that no such appeal lies.

Mr. Shadi Lal, in conclusion, urged that a subject of His Majesty the Emperor was illegally detained in prison and that we should call upon his keeper to show cause why the accused should not be set at liberty. We however declined to deal with this question as it is not before us. As a result we accept this preliminary objection and hold that no appeals lie to this Court from the order of the Superintendent, Hill States, Simla.

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## No. 15.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

CROWN—PETITIONER

*Versus*

RAM CHAND—ACCUSED.

Criminal Revision No. 1492 of 1909.

*Civil Procedure Code, 1882, section 136, Order XI, Rule 21 of Code of Civil Procedure, 1908—Disobedience of order of Court no longer criminal offence.*

*Held*, that the amendment of section 136 of the Code of Civil Procedure, 1882, by Order XI, Rule 21 of the new Code, Act V of 1898, has the effect of rendering a party to a suit who fails to comply with an order for production or inspection of documents punishable only in the manner prescribed by that rule, and not punishable under section 175 or any other section of the Penal Code.

*Case reported by W. A. Le Rossignol, Esquire, Sessions Judge, Amritsar Division, with his No. 1434 of 10th December 1909.*  
Roshan Lal, for accused.

*The facts of this case are as follows :—*

The petitioner has been summarily convicted by the Lower Court under section 175, Indian Penal Code, in a civil suit in which he was a defendant on the ground that he had refused to obey an order made by the Court to shew his books to the plaintiff.

The accused, on conviction by L. A. Bull, Esquire, exercising the powers of a Magistrate of the first class in Amritsar District, was sentenced, by order, dated 28th October 1909, under section 175 of the Indian Penal Code, to pay a fine of Rs. 50, or in default one month's simple imprisonment.

*The proceedings are forwarded for revision on the following grounds :—*

The Lower Court has summarily convicted under section 175, Indian Penal Code, petitioner, who was a defendant in a civil suit, on the ground that he had refused to obey an order made by the Court to show his books to the plaintiff.

The Lower Court states that petitioner replied with insolence, but it has convicted under section 175, Indian Penal Code, and, in inflicting the penalty, has remembered the petitioner's insolence. Had the Lower Court convicted under section 228, Indian Penal Code, for insolence on the part of petitioner, there would be no ground for interference, for the insolence appears to have been

rather of manner than of matter, but the conviction is under section 175, Indian Penal Code.

The question for decision is, whether the petitioner was legally bound to produce his books. I do not think so. Nobody is bound to produce a document before a public servant, until he gets an order to do so. In this case the order was to show the books to the plaintiff and not to the Court.

This, however, is a small point.

The main point is, whether a defendant is bound to obey an order of Court directing him to shew his books to his opponent.

The penalty on the civil side for a refusal is the loss of the suit. See Order XI, Rule 21, of the new Code, which differs significantly from section 136 of the old Code.

In the old section, the recalcitrant was declared to be guilty of an offence under section 188, not *section 175, Indian Penal Code*, but in the new Code or rather Order, the criminal penalty is entirely absent. The petitioner then may be guilty of an offence under section 188, but that offence is not triable under section 480, Criminal Procedure Code, summarily.

For these reasons I recommend that the conviction be set aside. The fine has been paid.

The order of the learned Judge was as follows :—

19th Feb. 1900.

SIR ARTHUR REID, C. J.—I concur with the learned Sessions Judge in the conclusion that the amendment of section 136 of the late Code of Civil Procedure by Order XI, Rule 21, of the present Code, and the omission from Rule 21 of all reference to section 188 or other section of the Penal Code indicate that a party to a suit, who fails to comply with an order for production or inspection of documents, can be punished only in the manner prescribed by that rule, and is not punishable under section 175 or any other section of the Penal Code.

As pointed out by the learned Sessions Judge, section 188 of the Penal Code was under the late Code the section applicable, but the amendment of the law has, in my opinion, made the Penal Code inapplicable to the action, or default of which the petitioner has been found guilty by the Magistrate.

I set aside the conviction and sentence. The fine, if realised, will be refunded.

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## No. 16.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge,  
and Hon. Mr. Justice Rattigan.*

THE CROWN—COMPLAINANT

*Versus*

SANT SINGH—ACCUSED.

Criminal Revision No. 1247 of 1909.

*The Indian Arms Act, XI of 1878, sections 4 and 19—Lead moulded into bullets—Ammunition.*

*Held*, that the definition of "ammunition" in the Indian Arms Act, 1878 (section 4), is not exhaustive, and that the question whether an article comes within the description of the Act is one of fact to be determined according to circumstances, and that lead moulded into bullets, of about 20 to 24 bore is "ammunition" and is not excluded from the definition of the word "Ammunition" in the Act.

*Case reported by H. Hircourt, Esquire, Additional Sessions Judge, Shahpur Division.*

Nand Lal and Gokal Chand, for accused.

Nemo, for Crown.

*The facts of this case are as follows :—*

The accused, on conviction by Bakshi Bhagwan Singh, exercising the powers of a Magistrate of the first class in Mianwali District, was sentenced, by order, dated 20th September 1909, under section 19 of Act XI of 1878, to one month's rigorous imprisonment only.

*The proceedings are forwarded for revision on the following grounds :—*

The Lower Court has made a clear error. Under section 4 of Arms Act, XI of 1878, lead is expressly excluded from the definition of ammunition. So there has been no offence. I forward the case to the Hon'ble Judges of the Chief Court in order that the sentence and conviction may be set aside.

Accused to be released on his bond of Rs. 100.

The order of the Court was delivered by:—

SIR ARTHUR REID, C. J.—The question for decision is, whether lead bullets of about 20 to 24 bore are "ammunition" within the meaning of the Arms Act. By Punjab Government notification No. 3998, dated the 8th November 1881, iron droppings or pellets known as *boonda* were declared to be, and by Government of India, Home Department, No. 1814, 5th March 1910.



dated the 19th December 1883, to Government, Bengal, bird-shot were declared not to be "ammunition" within the meaning of the Act. The distinction between *boonda* and bird-shot is significant, and in interpreting the Act we must, in our opinion, follow the rule laid down in *Queen-Empress v. Jayarami Reddi* <sup>(1)</sup>, that the question whether an article comes within a description in the Act is one of fact to be determined according to circumstances. The bullets in question can certainly be fired simply from a pistol or a gun with deadly effect on human or animal life, and that is their most probable use. Even if used with a sling, they would be deadly.

Bird-shot is used for many purposes other than being fired from a gun, and the difference in the effect of such shot or that of buck-shot or bullets is so great that the distinction drawn between the two classes of articles in Government notification and correspondence is obviously based on the fact that the one is dangerous to life from a distance from which the other would be innocuous and on the probable use of either class. It is unnecessary, for the purposes of this case, to decide between the conflicting rulings of this Court, *Jaman Khan v. Empress* <sup>(2)</sup> and of the Madras Court in *Queen-Empress v. Jayarami Reddi* <sup>(1)</sup> above cited, as to empty cartridge cases.

The definition of "ammunition" in the Arms Act is obviously not exhaustive, and, in our opinion, the "lead" excluded is lead which has not been moulded into bullets. A lump of lead may be used for many purposes, and the meaning of the Act, in our opinion, is that lead is not to be considered ammunition, merely because bullets may eventually be made of it. A steel rail and an iron bar might as well be included in the definition of Arms, because the blade and handle of a sword might be made of them.

As soon, however, as lead is moulded into a bullet of the size under consideration, that bullet becomes, in our opinion, "ammunition", and that word includes all that is comprised in the charge of a gun, *viz.*, percussion cap powder, bullets and wads.

Our reply to the question is therefore in the affirmative, and we maintain the conviction. The sentence, however, is obviously excessive.

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<sup>(1)</sup> (1893) 21 *Mad.* 360, *F. B.*

<sup>(2)</sup> 20 *P. R.* 1890 *Cr.*

The petitioner was sentenced to rigorous imprisonment for one month under section 19 of the Act for having in his shop, without a license, 33 bullets of the description under consideration.

It appears that such bullets are openly bought and sold, and it is evident from the opinion expressed by the learned Sessions Judge that no offence was committed, because the bullets are made of lead, that the petitioner might well have had no criminal intent.

Adopting the course followed in *Emperor v. Ebrahim Alibhai*,<sup>(1)</sup> and *Emperor v. Satish Chandra Roy* <sup>(2)</sup>, where a nominal sentence was inflicted, we set aside the unexpired term of the sentence of rigorous imprisonment.

The petitioner is released from his bail.

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**No. 17.**

*Before Hon. Mr. Justice Shah Din, and Hon. Mr. Justice Williams.*

(1) MADAN GOPAL, (2) MADAN MOHAN LAL,—(CONVICTS)—  
PETITIONERS

*Versus*

THE KING-EMPEROR OF INDIA—RESPONDENT.

Criminal Revision No. 104 of 1909.

*Indian Penal Code, Act XLV of 1860, section 294 A—Meaning of keeping an office for "purpose of drawing a lottery" and of the word "lottery".*

*Held*, that the words "any office or place for the purpose of drawing any lottery" in section 294 A of the Indian Penal Code mean an office or place intended to be the scene of the actual drawing of the lottery, and do not include an office or place kept only for the correspondence and other work connected with a lottery advertised "as going to be in some public place to be selected later on".

*Held, also*, that where the agreement was that "every subscriber pays Rs. 10-8 and gets a bond for Rs. 10. This sum is guaranteed by one of seven banks, and not only is negotiable but can be cashed at the bank at par at any time.—The draws were (*sic.*) to start when 2,000 tickets had been sold, and at stated intervals further drawings were to be made until every one had got a prize or had had their (*sic.*) money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize or decided to withdraw their money. Thus the original

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<sup>(1)</sup> (1905) 7 Bom. L. R. 474.

<sup>(2)</sup> (1907) 34 Cal. 749.

"ten rupees was absolutely safe, the extra eight annas was to cover the cost of correspondence, etc." This was a scheme for the distribution of prizes by lot or chance, and consequently came within the meaning of the word "lottery" as used in section 294 A, and that accused were, therefore, guilty of an offence under the second part of this section.

*Petition under section 439 of the Criminal Procedure Code for revision of the order of A. H. Parker, Esquire, Officiating Sessions Judge, Multan Division, dated the 23rd October 1908.*

Shadi Lal, for petitioner.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

18th Feb. 1910.

WILLIAMS, J.—In this case the petitioners have been convicted under both parts of section 294 A of the Indian Penal Code for having, firstly, kept an office or place for the purpose of drawing a lottery not authorized by Government, and, secondly, for having published a proposal to pay money on an event or contingency relative or applicable to the drawing of a ticket lot number or figure in any such lottery, i.e., in a lottery not authorized by Government. A single aggregate fine, a nominal one of Rs. 10, has been imposed in respect of the two offences, and the case is brought before us on the revision side.

As regards the keeping of the office the facts are thus stated in the judgment of the learned Magistrate who tried the case.

"It is proved that they (the two defendants) kept an office under the Punjab National Bank at Multan for the correspondence and other work of a lottery, and they published tracts in English and Urdu explaining and advertising their system. The office had a notice board outside labelled "Multan cash prize distributing agency" (or company). The first part of the section regarding lotteries says, "whoever keeps an office or place for the purpose of drawing a lottery etc.," and the defence plead that the office only consists of two rooms, each ten feet by twelve, while the drawing is advertised as going to be in some public place to be selected later."

On these facts the learned Magistrate comments that seeing that "the drawing of the lottery was the main feature of the undertaking, everything that leads up to this end is done for the purpose of finally making the draw; and so this small office, in which the preliminary



"business is done, is most distinctly an office kept for the purpose of drawing the lottery." With this view we find ourselves unable to agree. The provisions of the law in force in India against lotteries are largely based upon the Gaming Act of 1802 (42 George 3rd, Cap. 119), of which the relevant section runs—"No person or persons whatsoever shall publicly or privately keep any office or place to exercise, keep open, show or expose to be played, drawn, or thrown at or in, either by dice, lots, cards, balls or by numbers or figures or by any other way, contrivance or device whatsoever, any game or lottery called a little goe or any other lottery whatsoever not authorized by Parliament." It will be apparent from the language of the Act that the "office or place", the keeping of which is punished with the penalties provided for rogues and vagabonds, is intended to be the scene of the actual drawing of the lottery. Moreover, if the construction placed upon the section of the Penal Code by the learned Magistrate were correct, the word "drawing" in it would be quite superfluous; it would have been sufficient if the section had run—"Who ever keeps any office or place for the purposes of any lottery, etc." According to the ordinary canons of interpretation we are bound to assume that the insertion of the word had some significance, and equally as the section is a penal one, we are bound to construe it, where it is doubtful, in favour of the subject: and on both of these accounts it seems to us that the petitioners are entitled to a finding in their favour on this part of the case.

To illustrate our point of view by a parallel which is free from the disagreeable association of a lottery office, and, therefore, affords a safer basis for considering the effect of the actual language employed, we should say that if a person took an office for the purposes of an election, there would, of course, be no implication that the election would be held on the premises; but that if he took offices for the purpose of holding or conducting an election (as in this case for the purpose of drawing a lottery), there would, on the contrary, be such an implication.

Turning now to the conviction under the second part of the section the proceedings of the company, in respect of which the accused persons have been found guilty, are thus described by the Lower Court:—

“ In the Multan Company the agreement is as follows :—

“ Every subscriber pays Rs. 10-8 and gets a bond for Rs. 10. This sum is guaranteed by one of seven banks and not only is negotiable, but can be cashed at the bank at par at any time. The draws were to start when 2,000 tickets had been sold, and at stated intervals further drawings were to be made until everyone had got a prize or had had their money returned. Those who did not draw prizes in the first draw would go on drawing at each distribution till they got a prize, or decided to withdraw their money. Thus the original ten rupees was absolutely safe, the extra eight annas was to cover the cost of correspondence, etc.”

The above description is accurate, but to complete the matter we would add that at the first drawing there were to be 81 prizes varying from Rs. 1,000 to Rs. 12 and of an aggregate value of Rs. 3,000. It is not, however, germane to the present enquiry to consider whether the projectors of this scheme were likely to make a good thing out of it, or whether they were likely to satisfy all the hopes that they encouraged in their constituents. What we have to decide is, whether the proceedings described above come within the meaning of the word “ lottery ” as used in the section.

For the applicants it has been strongly urged upon us with much ability by Mr. Shadi Lal that inasmuch as there was no risk involved to the *corpus* of the stake, which could be recovered at any time at the will of the owner, and inasmuch as the speculation was confined to the amount of gain, or as the learned counsel put it—the interest, which that stake might secure, the proceeding does not amount to a lottery within the meaning of the section. And he pressed strongly upon us that this was the only logical conclusion that could be arrived at, having regard to the principles laid down in the cases reported as *Kamakshi Achari v. Appavu Pillai* (1) and followed in *Vasudevan Nambudri v. Mammod* (2). The circumstances of the first of these cases (and the two are practically identical) were as follows :—

Some twenty persons, desirous of getting together a little capital, agreed to contribute ten rupees a month apiece for twenty months, on the understanding that each contributor

(1) (1862-63) I. M. H. C. R. 448. (2) (1899) I. L. R. 22 Mad. 212.

was to take the total subscriptions for one month in turn, the order in which they took it being determined by lot. It has been argued before us that in that case as here, there was no risk of the principal stakes, that what was risked upon the casting of the lot was, whether a member should get Rs. 200, free of interest, for a period of 20 months or for a less period, and that as that arrangement was pronounced not to be a lottery, so the scheme now under consideration must similarly be held to be innocent. In our opinion, however, the two cases are not really *in pari materia* at all. In the first place it is, of course, an arithmetical error to say that in the Madras case the most successful of the parties stood to get Rs. 200, interest free, for twenty months, for every month he had to pay out Rs. 10 as his contribution toward the capital of one of the other subscribers. The amount of gain, therefore, which was put to hazard was nominal and the hope of making this particular gain formed no part of the object with which the subscription was started, which appears to have been simply and solely to provide each of the subscribers with a small capital, the drawing of lots being only intended to settle the order or turn in which each subscriber should take it. In the second place the proceedings in the Madras case were entirely private and extremely limited in extent: and we are, by no means, prepared to admit that if, in similar circumstances, subscribers had been invited by public advertisement and in thousands instead of units, so that the profit resulting from a lucky draw would have been substantial, the result of the case would have been the same. In the third place, we are unable to regard the gains which were to be made on the Multan Bank's speculations as interest at all. It might well have happened that the prize of Rs. 1,000 offered at the first drawing fell to a bond purchased only on the previous day. Would it have been open to the drawer to sue to recover Rs. 10 principal, lent on a bond, and Rs. 990, agreed interest upon the Rs. 10, for a period of one day? We have no doubt ourselves as to what the result of such a suit would be. The arrangement would be held to be a gambling transaction, pure and simple.

Apart, however, from the Madras cases the question whether it is an essential feature of a lottery that the gamblers should risk their stakes has been settled in the most definite manner by a series of English decisions, to which, as the law on the subject is entirely the outcome of Western ideas, we have no



hesitation in referring: In *Taylor v. Smetten* <sup>(1)</sup> the defendant sold packets of tea at half a crown each, every package containing a coupon which entitled the purchaser to a prize of uncertain value and character. It was admitted that the tea was good and worth all the money (or in other words, there was no risk of losing the stake), yet it was held that it was impossible to suppose that the aggregate prices charged and obtained for the package did not include the aggregate prices of the tea and the prizes. In other words, the purchaser bought the tea coupled with the chance of getting something of value by way of a prize, but without the least idea of what that prize might be. That was settled by chance, and to the learned Judge, who dealt with the case, it seemed immaterial whether a specific article was or was not conjoined with the chance and as the subject-matter of the sale. The scheme was consequently pronounced to be a lottery.

In *Reg v. Harris* <sup>(2)</sup> the facts were that 5,000 tickets of 1 s. each were to be issued, and bonuses to the amount of £250 were to be distributed. The principal "bonuses" were eight articles of value varying from £12 to £2, while the others consisted of geese, ducks, hares, rabbits, pipes, chimney ornaments, purses, etc., and were so arranged that every subscriber obtained something. For the defence it was urged that this was not a lottery as each person obtained full value for his shilling, but it was held that whether that were so or not, the case came equally within the mischief against which the Act prohibiting lotteries was directed, inasmuch as the subscribers were induced to part with their money in the hope of obtaining not only their shillings worth but something of much greater value, the right to which was to be ascertained by chance. The learned Judge (M. Smith, J.) accordingly directed the jury that the contention advanced for the accused person was no defence. A much stronger case than either of the above is to be found in *Willis v. Young and Steinbridge* <sup>(3)</sup>. In this case the proprietors of a newspaper made an indiscriminate distribution of medals, each of which bore a distinctive number and the words "Keep this, it may be worth £100. See the *Weekly Telegraph* to-day." The most elaborate precautions were taken to ensure that there should be no connection between the actual distribution of the medals and the sale of copies of

(1) (1) XI, Q. B. D. L. R. 207.      (2) X, *Com Cr. Law Cases*, 352.

(3) (1907) 1 K. B. 448.

the paper. There was no condition that a person holding one of the medals entitling him to a prize must purchase or product a copy of the paper in order to secure the prize. In the event of a person walking into the office with a medal, information would have been gratuitously afforded to him as to whether the medal entitled him to a prize or not, and a file of the paper was always available at the office for inspection by any person free of charge ; the paper was also supplied to, and could be inspected at, most reading rooms and many hotels. One of the medals was never given at the same time, as a copy of the paper was sold. If a person came to the office and asked to be given a medal he would be given one without any enquiry being made as to whether he had purchased a copy of the paper, and if he came there and bought a copy of paper and then asked for a medal, the medal would not be given to him. Under no circumstances was anything charged for the medal, nor could a purchaser of copy of the paper in any way secure the possession of a medal as a condition of the purchase. There was no coupon in the paper. Special instructions were always given to the distributors of medals (who were never employed to sell the papers), and the general instructions given to them were to admit news agents in their distribution and to place a medal in each letter box in every street. If a person living in the country had written to the office to ask for a medal, it would have been sent to him without either a stamped envelope or a penny stamp being sent to the office, and thousands of medals had been so sent. The proprietors of the paper hoped to get increased circulation of their paper and increased profits by the scheme, the object of which was to advertise the paper and thereby get an increased circulation. The object of distributing the medals was to induce persons to inspect the paper. The proprietors' hope and intention in distributing the medals was that the recipients might be induced to purchase copies of the paper. The scheme had been successful, and the object the proprietors had in view has been attained in a steadily increasing manner, the circulation of the paper having increased about 20 p. c. during the progress of the scheme. The proprietors did not refuse to sell at their office a copy of the paper to any stranger applying for it. They gave a medal for nothing to any stranger who came into the office and asked for one, without any enquiry as to whether he had purchased a copy, but they did not give a medal to the purchaser of a paper at the time of the purchase ; a person purchasing a paper at the office might have received a medal the day before, or might receive one the day after, the purchase. Here it will be

seen that it was not necessary for any individual prize winner to risk anything, but the object being to induce people to buy the paper and the object having succeeded, all the chances were, in fact, paid for in the mass by the general body of the purchasers of the paper, although individual purchasers might not have paid for their chance. On the strength of these decisions we have no hesitation in holding that the scheme put forward by the petitioners in this case was a lottery whether we adopt the definition of that word set forth in Websters' and Johnson's dictionaries that a lottery is "a scheme for the distribution of prizes by lot or "chance," or whether we accept the view of the Century Dictionary and the Oxford English Dictionary that the purchase of a ticket is an essential feature in a lottery. There is no question that there was here a scheme for the distribution of prizes by lot or chance, and tickets in the form of bonds were undoubtedly purchased.

We, therefore, uphold the conviction of the petitioners under the second part of section 204 A : as we have acquitted them of the offence charged under the first part of the section, we reduce the fines to Rs. 5, and direct that the balance, if realized, be refunded.

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## No. 18.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

THE CROWN—COMPLAINANT,

*Versus*

(1) YUSUF, (2) ALLA DITTA, AND (3) NAWAB —ACCUSED.

Criminal Revision No. 1479 of 1909.

*Criminal Procedure Code, Act, V of 1898, section 54—Power of Police officer to arrest—Indian Penal Code Act, XLV of 1860, section 99, explanation 2 and section 332.*

A Police constable in the absence of his Sub-Inspector went to investigate a case of burglary in a village. After two days' investigation he formed certain suspicions against several persons and went to the *thana* to get his report recorded. Thereupon the *thana* clerk gave him a note authorising him to take suspected persons to the *thanadar* who was in a neighbouring village. On the constable attempting to arrest the suspected persons he was assaulted by the accused who knew him to be a Police constable. Neither the note nor the clerk were produced in evidence. On conviction an objection based on section 99, explanation 2, of the Indian Penal Code, was raised. On revision the Chief Court

*Held*, that under section 54 of the Code of Criminal Procedure, 1898, a Police officer investigating a charge of burglary was empowered to arrest without an order from a Magistrate or a warrant any person against whom he had a reasonable suspicion of having been concerned in the burglary and that accused had consequently been rightly convicted under section 332, Indian Penal Code.

*Case reported by Major A. A. Irvine, Sessions Judge, Lahore Division, dated 10th December 1909.*

Gulu Ram, for accused.

The facts of this case are as follows :—

A case of house-breaking occurred in the village of Mandianwala, and in the absence of the Sub-Inspector, Fateh Din, constable, went to investigate it. He continued calling and questioning people for a couple of days without success, and then went and reported the result to the *muhaarir* at *thana*. The *muhaarir*, it is stated, gave a written order to the constable with a direction to take the suspected men to the *thanadar* who was putting up in a neighbouring village.

The accused, on conviction by N. Soadulla Khan, exercising the powers of a Magistrate of the first class in the Lahore District, was sentenced, by order, dated 28th October 1909, under section 332 of the Indian Penal Code, to fifteen days' rigorous imprisonment each.

The proceedings are forwarded for revision on the following grounds :—

The three petitioners have been convicted under section 332, Indian Penal Code, and have been each sentenced to undergo rigorous imprisonment for a term of fifteen days.

I do not see any force in the first point urged by petitioners' counsel, that the whole proceedings before the Magistrate are vitiated by the fact that petitioners were not (as he says) asked after the framing of the charge whether they wished to cross-examine the prosecution witnesses. According to counsel, section 256, Criminal Procedure Code, was not complied with ; and such a defect is not curable under section 537, Criminal Procedure Code. If the record be examined, we find that petitioners, accused, exercised fully their rights to cross-examine the prosecution witnesses prior to the framing of the charge ; and there is nothing to lead one to suppose that they later wished to ask further questions, or that they would have been refused had they made such a request. I fail to see that petitioners have been prejudiced.

The case is one of some importance, as it concerns an alleged assault on a constable ; and I may say at once that, on the evidence, I am quite prepared to believe that some sort of scuffle did take place in which the constable received certain simple hurts and damage to his clothing ; also, that the petitioners were fully aware that he was a constable.

According to the constable, in the absence of the Sub-Inspector, he went to the petitioners' village to investigate a case. He is admittedly illiterate ; and, after two days' investigations, went to the *thana* to get his report recorded. He had formed certain suspicions involving relations of the petitioners and the petitioner Yusuf, and, according to his story, the *thana muharrir* gave him a *ruqa* authorising him to take six suspected persons to the Sub-Inspector, who was elsewhere. That *ruqa* has never been produced ; the constable states that " he cannot " remember if he returned it," or what became of it ; and it is not mentioned by a single prosecution witness. There is nothing to show that it was ever produced to the petitioners ; and the *thana muharrir* has not been produced to say that he ever gave it. The inference is that no such *ruqa* ever existed. Petitioners resisted the constable's wish to take any one off to the Sub-Inspector ; and I see no reason to doubt that there was some sort of scuffle. Section 99, Indian Penal Code, is the section concerned ; and I think the latter part of explanation 2 of that section

applies since the constable's assertion is that he had a *ruqa*; which, however, is not forthcoming. The petitioners were fully aware that he was a constable; but I doubt very much that he had authority to haul off half-a-dozen persons to the Sub-Inspector on the strength of his own investigations, and, in my opinion, the petitioners had a right to resist. No doubt, assaults on the police should be severely punished when this may legally be done; but in the present case I accept the petition and forward the proceedings to the Chief Court recommending that the petitioners be acquitted—or, if it be held that they technically exceeded their rights, that the sentence be altered to sentences of fine only. Petitioners informed. They remain on their present bail.

The order of the learned Judge was as follows:—

SIR ARTHUR REID, C. J.—The Police officer found to 29th March 1910. have been assaulted was investigating a charge of burglary punishable under section 457 of the Penal Code. Under section 54 of the Code of Criminal Procedure he was empowered to arrest, without an order from a Magistrate or a warrant, persons against whom a reasonable suspicion of having been concerned in the burglary existed. The case is, therefore, clearly distinguishable from *Queen-Empress v. Dalip* <sup>(1)</sup>, which dealt with the arrest without a warrant under section 114 of a person called on to furnish security for good behaviour, the Court holding that the police officer who arrested without a warrant was not acting in the lawful discharge of his duty, there being no suggestion that section 56 of the Code of Criminal Procedure applied: and equally distinguishable from *Tafazzul Ahmed Choudhry v. Queen-Emprees* <sup>(2)</sup>, which dealt with an assault on a bailiff who purported to be attaching property in execution of a decree. The learned Sessions Judge has found that the Police officer had “formed certain suspicions involving” the persons whom he arrested, and the persons who assaulted him were fully aware that he was a constable. It is, however, doubtful whether the assault amounted to more than “a scuffle,” to use the learned Sessions Judge's language, and although I see no reason for interference with the conviction, I accept the learned Sessions Judge's suggestion that a fine should be substituted for imprisonment. It is unnecessary to discuss the application of section 99 of the Penal Code.

<sup>(1)</sup> (1896) I. L. R. 18, All. 246.

<sup>(2)</sup> (1899) I. L. R. 26, Cal. 630.



I set aside the unexpired terms of the sentences of rigorous imprisonment, and in lieu thereof I sentence each of the petitioners, Yusuf, Ala Ditta and Nawab to a fine of twenty-five rupees. On failure to pay the fine within fifteen days of communication to each of this order, he will undergo the unexpired term of his sentence of rigorous imprisonment. On payment of the fine each will be discharged from his bail.

No. 19.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

THE KING-EMPEROR OF INDIA—PETITIONER,

*Versus*

MUSSAMMAT ALAM KHATUN—(CONVICT)—RESPONDENT.

Criminal Revision No 597 of 1901.

*Jurisdiction—Frontier Crimes Regulation III of 1901—Section 59—Criminal Procedure Code, Act V of 1898—trial of a person under the Regulation without assistance of Council of Elders—Course of appeal.*

*Held*, that where a Magistrate empowered by section 59 of the Frontier Crimes Regulation III of 1901, tries without the assistance of a Council of Elders, a person charged with having done an act punishable under the Regulation, the ordinary course of appeal prescribed by the Code of Criminal Procedure (Act V of 1898) applies.

*Case referred by B. A. Estcourt, Esquire, Sessions Judge, Attock Division, with his letter No. 179 J., dated 9th April 1910.*

Government Advocate, for petitioner.

Nemo, for respondent.

The order of the learned Judge was as follows :—

13th May 1910.

SIR ARTHUR REID, C. J.—I am unable to concur with the learned Sessions Judge in holding that an appeal from the conviction and sentence of rigorous imprisonment for two years, including three months' solitary confinement, passed by a Magistrate of the 1st class, Mianwali, did not lie to his Court, the convict being a woman convicted of an offence punishable under section 30 of Frontier Crimes Regulation (III of 1901). Chapter IV of that Regulation is headed "Penalties." Sections 21 to 28 inclusive of the chapter deal with matters which are obviously not within the jurisdiction of the ordinary Criminal Courts and could not be decided by them. The last sections of the

Chapters 29 and 30, make the acts of carrying arms [under certain circumstances and of adultery by a woman, punishable.

These two sections were apparently included in this Chapter because they provide penalties for acts not punishable under the Penal Code, but section 59, in Chapter VII provides that the offences punishable under them may be tried by a Court of Sessions or by the Court of a Magistrate of the first class.

Chapter V is headed "Preventive and other authority and jurisdiction," but section 31 to section 37 inclusive might equally well have been included in Chapter IV, as they made certain acts punishable, and section 59 provides that an offence punishable under section 37 may be tried by any Magistrate of the 1st class.

Chapter III provides for trials by Council of Elders.

Section 60 in Chapter VII, cited by the learned Sessions Judge as ousting the jurisdiction of his Court, provides that, except as therein otherwise provided, no decision, decree, sentence or order given passed or made, or act done, under Chapter III, IV, V or VI shall be called in question in, or set aside by, any Criminal Court. Now the sentence and order passed by the Magistrate were passed in exercise of the powers conferred by section 59 which, as above stated, is in Chapter VII of the Regulation and is therefore not affected by section 60.

I see no reason to doubt that where a Magistrate, empowered by section 59, tries without the assistance of a Council of Elders, a person charged with having done an act punishable under the Regulation, the ordinary course of appeal prescribed by the Code of Criminal Procedure applies, and that in the present case an appeal lies to the Sessions Court. In practice recourse is had to the Council of Elders where a conviction in an ordinary Court is improbable.

The record will be returned forthwith to the Court of Sessions for disposal, and in returning it I draw the attention of the learned Sessions Judge to the apparent inappropriateness of the sentence of solitary confinement.

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## No. 20.

*Before Hon. Mr. Justice Scott-Smith.*

THAKAR SINGH—(ACCUSED)—PETITIONER,

*Versus*

CHATTAR PAL—(COMPLAINANT)—RESPONDENT.

Criminal Revision No. 90 of 1910.

*Criminal Procedure Code, Act V of 1898, sections 236 and 403—Indian Penal Code, Act XLV of 1860, sections 182 and 211—Acquittal of accused of an offence and section 182 no bar to the trial for an offence under section 211.*

T. S. reported to the police that C. P., had cut some reeds belonging to Government. The police after enquiry found the information given was false and sent up T. S. for trial under section 182, Indian Penal Code. At the same time C. P. filed a complaint under section 211, Indian Penal Code, against the same accused which was sent for trial to the same Magistrate. The Magistrate took the evidence sent up by the police in the section 182 case and acquitted the accused without calling upon C. P., the complainant, to produce his evidence in the section 211 case. The complainant filed a revision in the Court of the District Magistrate; who ordered a trial of the case under section 211, on the ground that it did not appear that the charge under this section had been investigated. On revision by the accused to the Chief Court--

*Held*, that the acquittal on the charge under section 182, Penal Code, was no bar to the subsequent trial of the offence under section 211, inasmuch as the offences under these sections are essentially distinct and sections 236 and 403, Criminal Procedure Code, had no application, there being no question of doubt as to which of the offences had been committed, and there could have been no charge in the alternative.

*Petition under section 439 of the Criminal Procedure Code, for revision of the order of Captain M. L. Ferrar, District Magistrate, Lyallpur, dated the 3rd September 1909.*

Ganpat Rai, for petitioner.

Sheo Narain, for respondent.

The judgment of the learned Judge was as follows :—

16th May 1910.

SCOTT-SMITH, J.—Thakar Singh, petitioner, reported to the police that Chattar Pal had cut some reeds belonging to Government from the banks of a water-course. The police after enquiry reported that the information given was false and Thakar Singh's prosecution for an offence under section 182, Indian Penal Code, was ordered and the case was sent for trial to Sardar Muhammad Sarwar Khan, Magistrate, 1st class.



At the same time Chattar Pal lodged a complaint against the same accused under section 211, Indian Penal Code, and it was sent to the same Magistrate.

The latter took the evidence sent up by the police in the section 182 case and acquitted the accused. He did not call upon the complainant to produce his witnesses in the section 211 case.

Upon an application for revision being made to the District Magistrate that officer recorded the following order :—

“ The charge under section 211, Indian Penal Code, does “ not appear to have been investigated. I send the case to the “ Court of Lala Govind Ram for trial.”

Thakar Singh has now moved this Court to set aside the order of the District Magistrate.

Mr. Ganpat Rai, for the petitioner, refers to section 403, Criminal Procedure Code, which says—

“ A person who has once been tried by a Court of competent “ jurisdiction for an offence and convicted or acquitted of “ such offence shall, while such conviction or acquittal remains “ in force, not be liable to be tried again for the same offence, “ nor on the same fact for any other offences for which a differ- “ ent charge from the one made against him might have been “ made under section 236, or for which he might have been con- “ victed under section 237.”

In order to see whether the latter part of this section applies we have to refer to section 236. By the latter section it is provided that if a single act or series of acts is of such a nature that it is doubtful which of several offences *the facts which can be proved*, will constitute, the accused may be charged with having committed all or any of such offences and any number of such offences may be tried at once, or he may be charged in the alternative with having committed some one of the said offences.

I do not see how a person could be charged in the alternative with having committed an offence under section 182 or one under section 211 of the Penal Code. The offences are essentially distinct as pointed out in *Emperor v. Sarada Prosad Chatterjee* <sup>(1)</sup> and *Emperor v. Ram Chandra Yeshwant Adurkar* <sup>(2)</sup>. In the latter ruling the distinction is very clearly explained.

<sup>(1)</sup> (1905) *I. L. R.* 32, *Cal.* 180.

<sup>(2)</sup> (1907) *I. L. R.* 31, *Bom.* 204.

I quote the following from page 206 of the report :—" The action which section 211, Indian Penal Code, renders penal, is action entailing very serious consequences, and therefore the more serious consideration is required of the individual who takes it. It is sufficient, therefore, in such cases for the prosecution to establish that there was no just or lawful ground for the action taken and that the accused knew this. But something more is required in the case of action referred to in section 182, Indian Penal Code. To bring a case within that section, it is necessary for the prosecution to prove, not merely absence of reasonable or probable cause for giving the information, but a positive knowledge or belief of the falsity of the information given."

In the present case the Magistrate acquitted the accused of an offence under section 182, Indian Penal Code, because he did not consider it proved that accused knew or believed the information given by him to be false. He did not consider whether it was proved that accused had no just or lawful ground for the action taken by him, and it is quite possible that complainant might have been able to produce evidence which would have satisfied the Magistrate on this point and would have justified the framing of a charge. This is not a case where there could be any doubt as to which of the two offences under section 182 and section 211, Indian Penal Code, had been committed; the question after all the evidence had been recorded would be whether either offence had been committed. It is thus clear that section 236 of the Code of Criminal Procedure has no applicability to the present case, section 237 refers back to the previous section. The trial ordered by the District Magistrate is therefore not barred by section 403 of the Code, and complainant is entitled to be given a chance of establishing his case.

The petition for revision is accordingly rejected.

*Revision rejected.*

## No. 21.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

MANGAL SINGH—(CONVICT)—PETITIONER,

*Versus*

THE CROWN—RESPONDENT.

Criminal Revision No. 286 of 1910.

*The Excise Act, XII of 1896, sections 3 (1) (n), 51 and 52—Applicability of licensee in possession of liquor in excess of amount specified in his license.*

*Held*, that a licensee may possess liquor in excess of the amount specified in section 3 (1) (n) of the Excise Act, 1896, and up to the amount specified in his licence or pass and that, if he is in possession of more than the latter quantity, he is punishable under section 51 of the Act which applies to "any person," section 52 of the Act providing a penalty for certain offences not punishable by section 51, the words "for the breach of which" rule or condition no other penalty is hereby provided "being clear and meaning that section 52 does not apply to cases for which a penalty is provided by some other part of the Act.

*Petition under section 439 of the Criminal Procedure, Code 1898, for revision of the order of Major A. A. Irvine, Sessions Judge, Lahore Division, dated the 8th February 1910.*

Jwala Parshad, for petitioner.

Nemo, for respondent.

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The contention for the petitioner is that section 51 of the Act, XII of 1896, does not apply to any license-holder, and that section 52 applies to the offence of which the petitioner has been convicted. I am unable to accept this contention. Section 51 provides a penalty of 4 months' imprisonment or Rs. 500 fine, or both, for possession of liquor in contravention of section 30.

21st May 1910.

Section 52 provides a fine of Rs. 50 for refusal to produce a license or breach by any person of any rule under the Act or of any condition of a license for breach of which rule or condition no other penalty is provided by the Act.

Section 30 forbids the possession of any quantity of liquor larger than that specified in section 3 (1) (n) unless the possessor is permitted to manufacture or sell the same or holds a pass therefor.



I understand these sections to mean that a licensee may possess liquor in excess of the amount specified in section 3 (1) (n) and up to the amount specified in his license or pass, and that, if he is in possession of more than the latter quantity, he is punishable under section 51, which applies to "any person", section 52 providing a penalty for certain offences not punishable by section 51, the words "for the breach of which rule or condition no other penalty is hereby provided" being clear and meaning that section 52 does not apply to cases for which a penalty is provided by some other part of the Act. The sentence is not, in my opinion, excessive, and there is no force in the ground taken.

The application is dismissed.

*Revision Rejected.*

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No. 22.

*Before Hon. Mr. Justice Scott Smith.*

NATHA SINGH AND OTHERS—(CONVICTS)—PETITIONERS,

*Versus*

THE CROWN—RESPONDENT.

Criminal Revision No. 437 of 1910.

*Indian Penal Code, Act XLV of 1860, sections 339 and 341—Wrongful restraint.*

The complainants charged the six accused with wrongful restraint in that they had prevented complainants from passing through certain fields over which, complainants alleged, they had a right of way to their well. The Magistrate convicted under section 341. The convictions were affirmed on appeal.

*Held*, following *Haveli v. The Empress* <sup>(1)</sup>, that the accused could not be convicted of an offence under section 341, Indian Penal Code, inasmuch as—

(1) complainants' right of way was not sufficiently established ;

(2) it was not shown that accused acted otherwise than *bona fide* in obstructing them, an act which fell within the exception to section 339, Indian Penal Code.

*Petition for revision under section 439 of the Criminal Procedure Code of the order of C. H. Atkins, Esquire, District Magistrate, Ferozepore District, dated the 16th February 1910.*

Sham Lal, for petitioners.

Sohan Lal, for respondents.

The judgment of the learned Judge was as follows :—

SCOTT SMITH, J.—The complainants in this case charged the six accused persons with the offence of wrongful restraint inasmuch as they had restrained the complainants from passing through certain fields on their way to their well. The fields are the private property of Wasawa Singh, father of some of the accused; other accused cultivate one of them, as tenants.

13th June 1910.

The Honorary Magistrates, who tried the case, found that complainants had always passed through the fields in question, and that accused by restraining them were guilty of the offence defined in section 339 of the Indian Penal Code. They accordingly fined them Rs. 15 each.

They appealed to the District Magistrate who, while 'inclined to think that the case was more properly one for a Civil Court' held that the road existed to the knowledge of the accused and that by merely 'voluntarily obstructing' the offence had been committed. He, therefore, maintained the convictions, but reduced the fines.

The accused have applied to this Court on the revision side.

The *dictum* of the learned District Magistrate that 'the offence under section 341 consists merely in voluntarily obstructing, and it is unnecessary to prove malice or wrongful intention' is hardly correct and loses sight of the exception to section 339, which is as follows :—

'The obstruction of a private way over land or water, which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.'

Now the revenue records show that there is no regular pathway through the accused's fields, and they have the right to prevent any person from passing through them who has not a right of way. The question whether the complainants have acquired such a right by long use is a difficult one, and it can hardly be said to have been affirmatively established in the present case. Moreover, having regard to the exception refer-

red to above, I do not think the accused should have been convicted, as they may very well have believed in good faith that they had a right to obstruct the path.

The case resembles that of *Haveli and another v. The Empress* <sup>(1)</sup> in which it was held that the accused had not committed an offence by preventing the complainant from passing over their ground, when they believed that they had a right to do so.

I agree with the learned District Magistrate that the present case is more properly one for the Civil Courts to adjudicate upon, and I hold that the accused cannot be convicted of an offence under section 341, Indian Penal Code, because—

(1) complainants' right of way is not sufficiently established ;

(2) it is not shown that accused acted otherwise than *bona fide* in obstructing them.

I allow the revision, and setting aside the conviction and sentences acquit the accused. Fines to be refunded.

*Revision Accepted.*

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(1) 25 F. R., 1888 Cr.



## No. 23.

Before Hon. Sir Arthur Reid, Kt, Chief Judge, and Hon. Mr.  
Justice Chevis.

GIRDHARI LAL AND OTHERS—(CONVICTS)—  
PETITIONERS

*Versus*

THE CROWN—RESPONDENT.

Criminal Revision, No. 477 of 1910.

*Criminal Procedure Code, Act V of 1898, sections 75 and 537—Gambling Act, III of 1867, section 5—Search warrant signed by Magistrate outside the local limits of his jurisdiction issued without affixing Court's seal—illegal warrant.*

On a search warrant issued by a Magistrate of the first class under section 5 of the Gambling Act, 1867, the Police raided the house of G, and he and others found in the house at the time were sent up for trial by the Police. The defence raised two objections to the legality of the search warrant—

- (1) that the seal of the Magistrate's Court was not affixed to it, and
- (2) that the warrant was signed by the Magistrate at a place outside the local limits of his jurisdiction.

The Magistrate, however, convicted the accused under sections 3 and 4 of the Gambling Act. On appeal the conviction was upheld. The Chief Court on revision :

*Held*, that the omission to affix the seal of the Court on the search warrant was a mere irregularity cured by section 537 of the Criminal Procedure Code, 1898, but that the search warrant having been signed by the Magistrate at a place outside the local limits of his jurisdiction was illegal.

*Held also*, following *Benwari v. Queen Empress* <sup>(1)</sup> that a warrant which is not a legal warrant is no warrant at all for the purposes of the Gambling Act.

*Petition for revision, under section 439 of the Criminal Procedure Code of the order of Major R. S. M. Burlton, District Magistrate, Jullundur District, dated the 16th February 1910.*

Pestonji Dadabhai, for petitioner.

Nemo, for respondent.

The judgment of the Court was delivered by—

CHEVIS, J.—On a search warrant issued by a first class 14th June 1910. Magistrate the police raided the house of Girdhari, and Girdhari and various persons found in the house at the time have been convicted and sentenced under the Gambling Act. The District Magistrate having dismissed their appeal, the convicts apply to this Court for revision, and on their behalf it is urged, that the search warrant is bad on two grounds :—

(1) 11 P. R., 1895, Cr.

(1) that the seal of the Magistrate's Court was not affixed to it ;

(2) that the warrant was signed by the Magistrate at a place outside the limits of his jurisdiction.

Section 75 of the Criminal Procedure Code lays down that every warrant of arrest issued under that Code shall bear the seal of the Court, and turning to *Alter Kaufman v. The Government of Bombay* (1), we find an opinion expressed on pages 668 and 669 as to the necessity of a seal in the case of warrants of arrest issued under Act III of 1864 (an Act to give the Government certain powers with respect to foreigners). But since this ruling was passed the Criminal Procedure Code of 1898 has come into force, and we now find as an illustration to section 537 the case of a Magistrate initialling a document which he is required by law to sign ; this is declared to be merely an irregularity not affecting the validity of the proceeding. In our opinion the omission to affix the seal is a similar irregularity, and therefore, even granting that law requires that a search warrant issued under the Gambling Act should be sealed with the seal of the Court, we hold that the omission to affix the seal is a mere irregularity cured by section 537 of the Criminal Procedure Code.

The other objection taken to the warrant is a much more serious one. The warrant was signed by the Magistrate at his private house, which is only just outside Jullundur, but situated in Kapurthalla territory. The District Magistrate has quoted *Reg. v. Lochaka La* (2), but this seems to us to be rather in favour of the petitioners. There the warrant for the arrest of a non-European British subject in respect of an offence committed in Kathiawar was issued from a place in Kathiawar territory by a Magistrate who, in addition to holding magisterial powers in a British district, viz., the Ahmedabad district, was also Assistant to the Political Agent in Kathiawar. The warrant was issued to the *Faujdar* of Palyad who, though Palyad is in foreign territory, was invested with police powers extending over a certain village of the Ahmedabad district, in which village the accused was arrested in execution of the warrant. The High Court held that " the offence having been " committed in a foreign territory the presence of Major Wodehouse in the portion of the Ahmedabad district in which he

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(1) (1894) *I. L. R.* 18 *Bom.* 636.      (2) (1876-77) *I. L. R.* 1 *Bom.* 340.

“has jurisdiction was unnecessary for the purpose of issuing “the warrant.” Presumably had Major Wodehouse had no powers in Kathiawar he could not legally have issued a warrant while he was in Kathiawar. We are unaware of any ruling to the effect that a Magistrate holding powers within certain local limits (such as a district or subdivision of a district) can exercise those powers from a place beyond the limits of his local jurisdiction. We must therefore hold that the warrant is illegal. This is no question of mere irregularity. As has been held in *Benwari v. Queen Empress* (1), a warrant that is not a legal warrant is no warrant at all for the purposes of the Gambling Act.

The convictions are set aside and the petitioners are acquitted. The fines, if paid, will be refunded.

*Revision accepted.*

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No. 24.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.  
Mr. Justice Rattigan.*

GUL HASSAN AND RASUL KHAN—(CONVICTS)—  
APPELLANTS,

*Versus*

THE KING-EMPEROR OF INDIA—RESPONDENT.

Criminal Appeal No. 8 of 1910.

*Act I of 1872—Indian Evidence Act, Section 30—Confession—Admissibility against co-accused—Retracted confession—Conviction on confession alone.*

Where three persons were charged with murder and one of them made detailed statement to the police which he soon after repeated before the committing Magistrate during the trial in which statements he alleged that the other two had committed the murder and compelled his assistance by force and threats of death and moreover made out that he had taken a very minor part (under threats of death) in the commission of the crime.

*Held*, by the Chief Court on appeal that this was in no sense a confession for the purposes of section 30, Indian Evidence Act, and could not be used against the co-accused.

*Held*, also, that the so-called confession having been retracted in the Sessions Court and there being no other evidence against the alleged confessing accused he was entitled to an acquittal.

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(1) 11 P. R. 1895, Cr.



*Appeal from the order of E. A. Estcourt Esquire, Sessions Judge, Attock Division, dated, the 13th December, 1909.*

Vishnu Singh, for appellants.

Government Advocate, for respondent.

The Judgment of the Court was delivered by :—

29th March 1910.

RATTIGAN, J.—Three persons, namely, (1) Said Rasul *alias* Rasul Khan ; (2) Gul Hassan, brother of the said Said Rasul ; and (3) a youth by name Muhammad Khalil (aged 18, and the cousin of the two first named persons) have been convicted by the Sessions Judge of the Attock Division, agreeing with the opinions of the assessors, of the murder of one Mussammat Gul Jan, *alias* Rahmat Jan, at Mianwali on the 25th May 1909, and have been sentenced the first two to death and the third to transportation for life. They have appealed from the order of the Sessions Judge and their case also comes before us under section 374 of the Criminal Procedure Code, for confirmation of the sentences passed upon the first two accused. The case is one of peculiar difficulty and for this reason as also because it involves a question of life or death, we have given it our most careful consideration. It seems that on the 25th July 1909, one Said Muhammad, a warder in the Mianwali Jail, happened to be passing by a disused well near the Jail and by chance looked down into it. He saw a body floating on the surface and forth-with went off to the police *thana* and made a report of what he had seen, and he added that he was unable to say whether the body was that of a human being or an animal. Information was at once given to the Sub-Inspector who happened to be away from the *thana* when the report was made, and the same evening that officer proceeded to the well and finding that nothing could be done at the time as the well was very deep and it had become dusk, he put a guard over the place. On the morning of the 26th July the body was taken out and found to be in a very decomposed state. It was at once sent to the Civil Surgeon for examination and was found to be that of a woman. The corpse when found had upon it a *khaki kurta* and certain glass bangles, but owing to the decomposition which had set in, the Civil Surgeon was of opinion that identification was impossible so far as the body and its features were concerned. He was of opinion that the body must have been in the water for 2 to 4 weeks or even more ; and that the woman must have been dead before she was thrown into the well, this opinion being based on the facts that the legs crossed each other and the thighs touched the abdomen and that there was no water found in the stomach

or the lungs. On the 30th July the Sub-Inspector on examining his registers found that there had been received a report to the effect that one Kudrat Khan, a jailor in the Mianwali Jail, had in April abducted the wife of the son of one Saadat, a *mirasi* of Rajoya. He accordingly went to the jail, taking with him the *kurta* and the glass bangles, in the hope that some one might be able to throw light upon the affair.

The Jailor, Wali Ahmad, to whom the Sub-Inspector first applied for assistance, seems to have suggested that the material of which the *kurta* was made was similar to that of which the *pagris* or *safas* of native infantry soldiers are made, and he threw out a hint that a brother of Rasul Khan had been to Mianwali on a visit and that the former was a *sepo*y in a regiment. He suggested that the articles might be shown to Mussammat Alam Khatun, the jail matron. This was done and the matron at once identified the *kurta* as belonging to a young woman of the name of Mussammat Gul Jan who, she said, had been living in the quarters of Said Rasul (*alias* Rasul Khan) and was said to be the wife of the latter's brother, Gul Hassan, a *sepo*y in a native infantry regiment. She said that she had no hesitation in identifying the *kurta* as it was "sewn" in her presence and that in point of fact she had herself sewn a certain part of it. The matron further informed the police that Said Rasul had three women living with him in May 1909, (1) Mussammat Bukhtan, who was said to be his own wife; (2) Mussammat Sharfo; and (3) Mussammat Gul Jan, the alleged deceased woman. She has in her evidence before the Sessions Judge deposed to a similar effect and has stated that Gul Hassan came to Mianwali and that on one evening about 7 or 8 P. M. Mussammat Gul Jan informed her that she (Mussammat Gul Jan) was going away early with Gul Hassan and that they were going to the hills. Since then she never saw Mussammat Gul Jan again; but she had no hesitation in identifying the *kurta* and the bangles as those worn by that woman.

After examining the above persons and certain others (including one Muzaftar Shab, a warder, with whom Mussammat Gul Jan is alleged to have had an intrigue) the Sub-Inspector found that Said Rasul had taken leave on the 10th July and had gone to his home which was stated in the "service book" to be *maura* Nartopa, in the Attock district. On the 3rd August he arrived at the Hazro *thana* and from inquiries there made he discovered that Said Rasul was in fact a resident of *maura* Rajoya in the Abbottabad district and he accordingly

proceeded to the latter village, where he arrived on the 6th August. The houses of Said Rasul, his father and his cousin were promptly searched and in the former was found a trunk which was locked. Said Rasul said the trunk belonged to his brother, Gul Hassan, and that the latter had the key, whereupon the trunk was broken open and found to contain various articles of jewellery worn by women. Said Rasul was examined by the police but stated that he knew nothing about any woman of the name of Mussammatt Gul Jan and that the jewellery and the trunk belonged to his brother, Gul Hassan. We refer to this statement solely because it is in entire accordance with the statement he made subsequently, on the 22nd September 1909 to the Magistrate, 1st class.

Said Rasul was arrested at *mauza* Rajoya on the 6th August and taken to Mianwali on the 9th *idem*. On the 13th August Muhammad Khalil, who was at the time a warder in the Multan Jail, arrived at Mianwali under arrest, and from the police papers it appears that on the mornings of the 14th and 15th August, he (for some unknown reason) made two more or less identical and detailed statements to the police, as a result of which further search is said to have been made in the well, leading to the discovery of pieces of the bag in which the corpse is said to have been enclosed previously to being thrown into the well. On the 16th August Muhammad Khalil made the statement to Rai Ganga Ram, which is referred to, and treated by the Sessions Judge, as a "confession." It is, in point of fact, nothing of the sort, as we shall presently show, and there can be no doubt that it was wrongly admitted in evidence against the two other accused. We shall deal with this part of the case later on. It is only necessary here to remark that this "confession" was subsequently retracted, and is said to have been made in consequence of police malpractices.

On the 20th August, Gul Hassan who was with his regiment at Kohat was then arrested by the police.

The three accused were tried for the offence of murdering Mussammatt Gul Jan and the Sessions Judge sums up the case "against them in the following words :—" The evidence produced, "apart from the confession, clearly shows that the body found "was that of Mussammatt Gul Jan, otherwise Mussammatt "Rahmat Jan; that she had been living in the jail quarters "with Said Rasul ostensibly as his brother's wife; that Gul "Hassan was in Mianwali for some days before the night



“ of the 25th May and that he went away on the morning  
“ of the 26th May, that Mussammat Gul Jan had had quarrels  
“ with Said Rasul and Gul Hassan, and that she disappeared  
“ on the night of the 25th May. Taking this into considera-  
“ tion, and also taking into consideration the confession made  
“ by Muhammad Khalil, the recovery of the pieces of sacking  
“ from the well on the 15th August, and the jewellery at  
“ Rajoya on the 4th August, including the broken nose orna-  
“ ment and the necklet with the broken string, I find the  
“ corroborative evidence is so overwhelming that there can be  
“ no doubt but that the confession made by Muhammad Khalil  
“ is substantially correct. The assessors carefully considered  
“ the case and arrived at the same opinion.”

We might here add that Mussammat Gul Jan, *alias* Rahmat Jan, is said to have been originally married to one Fatteh Khan, of Nawanshahr, and to have been abducted from him some four or five years before the alleged murder. Fatteh Khan has been examined and he purports to identify a certain nose ornament and some clothes as the property of his wife. He admits that “other people have clothes like this” and he says that one Nur Ahmad made the nose ornament. Nur Ahmad (P. W. 9) deposes that he made the gold part of the nose ornament for Fatteh Khan some five or six years ago, but adds that other goldsmiths make similar nose ornaments. In view of this evidence it is hardly fair to the accused to say that the cloth and the nose-ring were identified by Fatteh Khan and Nur Ahmad. In a sense they were, but the so-called identification of articles very like those generally worn by women cannot be regarded as entitled to much value. On the other hand Mussammat Alam Khatun (P. W. 14), the jail matron, appears to have no doubt as to the jewellery produced being the property of Mussammat Gul Jan, and there seems to be no reason to discredit her evidence. She would appear to be an impartial disinterested person who had ample opportunity of becoming familiar with Mussammat Gul Jan and the latter's clothes and ornaments. Nor do we see any reason for not accepting her evidence to the effect that on the day previous to her disappearance from Mianwali, Mussammat Gul Jan had told her that she was going away early the next day with Gul Hassan to the hills. In view of this evidence and of Mussammat Alam Khatun's very positive statement that the *kurta* found on the body of the corpse, we must conclude that the body was that of the young woman who was known to the jail people as Mussammat Gul Jan and was at the time living with Gul

Hassan in the jail quarters adjoining those occupied by Said Rasul. That this young woman was foully murdered and that her corpse was thereafter thrown down the well, are facts, in our opinion, well substantiated. But there comes the next, and most important question, who committed this murder ?

The learned Sessions Judge in arriving at the conclusion that it was committed by Said Rasul and Gul Hassan with the connivance of Muhammad Khalil, has relied very largely upon the so-called "confession" made by the last-mentioned person before Rai Ganga Ram, though the other facts proved in the case lend, in his opinion, corroboration to the statements made by Muhammad Khalil. Before proceeding we might here observe that it is only in this "confession" that any motive is alleged for the crime, and that if this confession is ruled out of Court (as in our opinion it must be), there would seem to be no very strong reason for Said Rasul and Gul Hassan putting the unfortunate young woman to death. Even in the "confession" the motive assigned is a very weak one, the suggestion being that Mussammat Gul Jan had insisted on going back with Gul Hassan whereas the latter was not in a position to provide accommodation for her at Kohat where his regiment was quartered. Gul Hassan had abducted the woman and was apparently fond of her, for it was on her account that he seems to have paid the visit to Mianwali in May 1909, and deceased was, it seems, a young and attractive woman. She had not been able to get on very well with Said Rasul and Mussammat Bukhtan, but it is not very easy for us to appreciate this motive on the part of Said Rasul and Gul Hassan for suddenly resolving to put her to death. If we eliminate Muhammad Khalil's "confessions," there is little on the record to support the prosecution theory that the unhappy woman had proved herself to be a nuisance and that accordingly these two Pathaus, with their peculiar views on the subject of the value of a woman's life, had decided to kill her. This brings us to a consideration of Muhammad Khalil's so-called confession made before Rai Ganga Ram on the 16th August.

We are entirely unable to accept this as a "confession" within the meaning and for the purposes of section 30 of the Indian Evidence Act. With its legal aspect we shall deal presently, but before doing so, we must, in the first instance remark that it is a curious fact that on the 6th August (*i.e.*, some 6 or 7 days before Muhammad Khalil was arrested and at a time when apparently nothing definite was known

as to the details of the crime), an entry in the police *zimmies*, made at Rajoya, discloses the fact that "a respectable man" who does not wish to disclose his name "came forward and told the police practically everything that was subsequently stated by Muhammad Khalil in his "confession." Full details of the crime were given, though obviously those details (upon the prosecution theory) could be known to only three persons, Said Rasul (who was then under arrest and was stoutly denying all knowledge of the murder), Gul Hassan (who was at Kohat) and Muhammad Khalil (who was at Multau). This respectable person even went so far as to point out that the body before it was thrown into the well, had been put in "a sack"—a fact which should have led the police to search the well for the sacking before Muhammad Khalil's statement to the same effect, ten days later, suddenly inspired them with that idea. Now, how came this respectable man to know all these details on the 6th August? It is quite clear that Said Rasul had not made mention of the murder, and he was the only one of the three accused present at the time at Rajoya. Then again what necessity was there for the police to get Muhammad Khalil to twice repeat his "confession" to them on the 14th and 15th August respectively before they took him before the Magistrate on the 16th August? These are facts which *per se* must make us pause before we can accept without reservation the so-called confession made by Muhammad Khalil on the 16th August, a confession which (apart from other objections) is of but little value in face of the fact that it was afterwards retracted in the Sessions Court. Before proceeding we must refer to one other incident. The learned Government Advocate, quite rightly, laid some stress on the evidence of one Bhagwan Das, a *sunar* of Rajoya (P. W. 7). Standing by itself the evidence given by this witness does certainly lend strength to the prosecution theory, for Bhagwan Das deposes that the day before the accused Said Rasul was arrested, the latter (who was illiterate) brought him a letter and asked him to read it. The witness says that this letter was to the effect that the body had been found, and that the accused had better take measures for his safety, and he adds that the accused thereupon snatched the letter away and went off with it. On reference to the police files we find that on the 7th of August this witness informed the police that the accused had brought him a bearing letter to the above effect. The learned Government Advocate who had not all the facts before him, suggested to us that this letter



must have been written by either Gul Hassan or Muhammad Khalil, and obviously that would be the inference. But a scrutiny of the police file discloses the very important fact that this letter was actually written by one Muhammad, son of Hayat, and that the latter wrote it because he had heard from the jailor and others at Mianwali that the body found in the well was that of Rasul Khan's (*alias* Said Rasul's) sister-in-law. It is we think, a matter for regret that a piece of evidence which *prima facie* appears to tell strongly against the accused, but which in reality only shows that from the outset of the case the Mianwali jail authorities had made up their minds that the corpse was that of Mussammat Gul Jan and that Said Rasul had had a hand in getting rid of her, was allowed to stand as it does on the file of the Sessions Judge without any explanation. As matters stand, the deposition of Bhagwan Das must necessarily have carried weight with the assessors who heard it given in open Court, and who had not the police papers before them. That this must have been so is evident from the fact that the learned Government Advocate himself laid no little stress on this seemingly very incriminating letter and suggested with the most perfect *bona fides* that it was sent as a warning to Said Rasul by either Gul Hassan or Muhammad Khalil. And yet we find that it emanated from neither of the latter, and that, it was written merely in consequence of the gossip that was going on in the jail after the body had been found. In our opinion it would have been more fair to the accused if the prosecution had produced this man, Muhammad, and had allowed him to give his explanation of the letter which the witness Bhagwan Das refers to. Had this explanation been given, there can be little doubt that the incident deposed to by the witness would have been regarded as of no weight.

To turn now to the so-called "confessions" made by Muhammad Khalil on the 16th August and the 22nd September 1909. Section 30 of the Indian Evidence Act, 1872, provides that "when more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession." "Offence," as used in this section, includes the abetment of, or attempt to commit, the offence (explanation). But it is settled law that a confession, in order to be admissible under this section, must implicate the

confessing prisoner substantially to the same extent as it implicates the person against whom it is to be used. Since the amendment of the section, it may well be that a confession which inculpates its author merely of abetment, may nevertheless be used as a confession against the other co-accused who is therein charged with being the principal offender. But in the present instance Muhammad Khalil has throughout maintained that he was forced, by threats of death, to remain an impassive agent in the crime. On the 16th August he stated as follows:—"Said Rasul awoke me from sleep and asked me if I would go by their word or by Mussammatt Rahmat's. I said, I will do neither and exhorted Gul Hassan and Said Rasul not to murder Mussammatt Rahmat but let her off. They replied they would never let her off . . . Said Rasul and Gul Hassan asked me to sit at the door and warn them of the approach of any body, *otherwise they held out a threat to murder me. I sat at the door out of fear . . .* I stuck to my post. They returned at about 1 A. M. and told me that they had put some bricks in the sack and thrown the sack in a well. They told me not to divulge the secret; if it were done, I too would be murdered." Again on the 22nd September he stated that the woman was murdered by Gul Hassan and Said Rasul and thrown into the well, and he added, "they threatened to kill me, and so I kept silent for fear of my life." He further explained on this occasion, that the two other accused "seated" him outside the door, saying "if anyone comes, inform us, otherwise keep quiet. After this Gul Hassan and Said Rasul strangled her, I heard her cries and *became afraid of my life and kept quiet.*" We do not lay any stress on the fact that on the 22nd September the confessing accused informed the Magistrate that he had been offered a pardon by the Superintendent of Police. The Magistrate disillusioned him on this point before he made his statement. But we cannot possibly accept the statements made by Muhammad Khalil as a "confession" within the meaning and for the purposes of section 30 of the Evidence Act. He does not even admit that he abetted the murder. His allegation is that he was forced by threats of death to sit outside the door and that he acted in this impassive manner because he was in fear of his own life. This is not a confession of guilt in any sense of the term. We must accordingly eliminate from our consideration the statements made by Muhammad Khalil on the 16th and 22nd September,

and we have the less hesitation in doing so in view of the other facts to which we have already referred.

There is then no direct evidence against the accused persons of either (1), any immediate motive for the crime, or (2) their participation in its commission.

The case against the accused persons thus rests on purely circumstantial evidence. We must, on the evidence, accept as proved facts (1) that Mussammat Gul Jan was seen alive on the 25th May, and that on this date she informed Mussammat Alam Khatun that she was going off early next day with Gul Hassan; (2) Gul Hassan went off on the morning of the 26th May; (3) that Gul Hassan was living at the time with Mussammat Gul Jan in quarters adjoining those occupied by Said Rasul; (4) that Mussammat Gul Jan disappeared after the 25th May and was never heard of until her body was taken out of the well on the 26th July; (5) that the unhappy woman was unquestionably murdered somewhere about this time and her body thrown into the well; and (6) that Said Rasul, when arrested on the 6th August at Rajoya, had in his possession a trunk which contained jewellery (including the necklet with the broken thread, and the broken nose-ring) which has been identified as belonging to the deceased woman. There is further, the very significant fact that though Mussammat Gul Jan undoubtedly disappeared on the night of the 25th 26th May, no report of her disappearance was made by either Gul Hassan or Said Rasul to the police and that neither of them mentioned this fact to any one. The question before us is, whether upon these facts the three accused persons can be held guilty of her murder? As regards Muhammad Khalil, we have no doubt at all. He was in no way concerned with, or interested in, the crime and there is, as the learned Government Advocate admits, nothing against him but his own statements. We have some reason to doubt the genuineness of those statements, but even if we accept them as they stand, they merely go to show that Muhammad Khalil was compelled by fear of death to take the very minor part that he is said to have taken. According to his own statement, he protested against the crime and the only thing that could be alleged against him (so far as his statements go) is that he did nothing to prevent a murder. We are by no means satisfied that his statements, which were subsequently retracted, correctly represent the facts, but even if we take them as true, he cannot be held guilty of the murder of Mussammat Gul Jan, or indeed of



its abetment. Cowardice is not a criminal offence, and practically it is to this alone that Muhammad Khalil pleads guilty when he says that after vainly trying to dissuade the two other accused persons from committing murder, he sat outside the door in fear of his life. We must therefore accept his appeal and set aside the sentence passed upon him. But as against Gul Hassan and Said Rasul, the case is, in our opinion, clear. Mussammat Gul Jan was unquestionably in their company on the 25th May and was to have left Mianwali with Gul Hassan on the 26th May. She was never again seen at the Jail and Gul Hassan arrived at Kohat, admittedly without the woman, on the 27th May. And on the 8th August a trunk containing jewellery which has been satisfactorily proved to have been the property of Mussammat Gul Jan, and to have been worn by her at Mianwali, is found in a trunk in the house of Said Rasul at *maza* Rajoya. The accused have given obviously false explanations to account for their possession of this jewellery, and what is even more significant, neither brother gave any information to the police regarding the mysterious disappearance of Mussammat Gul Jan on the night of the 25th-26th May. The suggestion that she may have been murdered by some lover who was averse to her going back with Gul Hassan is fanciful and in view of the fact that all her jewellery was found in the possession of Said Rasul—and especially with reference to the necklet with the broken thread, very improbable. If the woman was intending to elope with a lover, she would hardly have abandoned her ornaments or gone out of her way to forcibly break off her necklet and her nose-ring.

We have given the case our most careful consideration and we regret to say that we must hold that there can be no doubt that the unhappy woman was foully murdered on the night of the 25th-26th May, and that her murderers were the two brothers, Gul Hassan and Said Rasul. What their object or motive may have been is not altogether clear, but there can be little, if any doubt, that the woman had become a nuisance to the brothers, and it is unfortunately not unknown to the Courts that Pathans hold life, and especially a woman's life rather cheap. But be their motive what it may, we are satisfied that Gul Hassan and Said Rasul have been rightly convicted of the murder of Mussammat Gul Jan, and we accordingly reject their appeals and confirm the sentences of death passed upon them. The murder was cold-blooded and cowardly, and no sentence other than that of death would be appropriate.

## No. 25.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

THE CROWN—COMPLAINANT,

*Versus*

ABDUL GHANI—ACCUSED.

Criminal Revision No. 79 of 1910.

*Criminal Procedure Code, Act V of 1898, section 250—Prosecution instituted by District Judge on the report of process-server—Acquittal of accused—Liability of process-server to pay compensation.*

Held following *Bharut Chander Nath v. Javed Ali Biswas* <sup>(1)</sup> and *In the matter of the petition of Ram Padarath* <sup>(2)</sup> that a process-server, on whose report that the accused had obstructed him while executing a warrant for custody of a wife, the District Judge instituted criminal proceedings against the accused, is not a person upon whose complaint or information the accusation was made and is not liable to pay compensation under section 250 of the Code of Criminal Procedure.

*Case reported by H. A. Rose, Esquire, Sessions Judge, Ambala*

*Division, with his No. 92-P of 10th January 1910.*

*The facts of this case are as follows :—*

Abdul Ghani, process-server, made a report to the effect that on 15th April 1905 he received a warrant for the arrest of Mussammat Bhani, daughter of Kanhya, resident of *mauza* Khatauli, against whom a decree for custody had been obtained by one Fateh Singh; that he accompanied by the decree-holder reached *mauza* Khatauli; that Mussammat Bhani was found sitting in front of her house; that she at first resisted the arrest but afterwards accompanied him with the decree-holder; that when they had gone a distance of some 300 paces Mussammat Ganeshi and Nando arrived, caught hold of Mussammat Bhani's arm and cried out that Mussammat Bhani was being taken away by the process-server; that thereupon seven accused arrived out of which the complainant identified Kapur Singh and Mutsaddi; that Kapur Singh wanted to see the warrant and on the same being shown to him, he snatched away the warrant and tore it into pieces and then took away Mussammat Bhani by force; that none of the villagers would give evidence for him and consequently he got his report attested by two passers by but he does not recognise them either.

One of the witnesses to the report who was traced denied any knowledge of the occurrence or signing the report. The other attesting witness could not be traced. Punnu, a third

<sup>(1)</sup> (1892) I. L. R. 20 Cal. 481.

<sup>(2)</sup> (1904) I. L. R. 26 All. 183.

witness to the report, also pleaded ignorance about the occurrence and denied affixing his thumb impression to it.

The accused were acquitted by M. Sabib Dad Khan, exercising the powers of a Magistrate of the 1st class in the Ambala District, but the complainant Abdul Ghani was directed, by order, dated 5th July 1909, under section 250 of the Criminal Procedure Code, to pay Rs. 5 to each of the 9 accused as compensation, *i.e.*, Rs. 45 in all.

*The proceedings are forwarded for revision on the following grounds : -*

The proceedings are forwarded for revision of the order awarding compensation to the accused on the authority of *In the matter of the petition of Ram Padarath* (1) and *Bharut Chander Nath v. Jated Ali Biswas* (2). A peon who makes a report of resistance to attachment is not a complainant and cannot be made to pay compensation to an accused.

On the merits I express no opinion as the whole of this series of charges and countercharges is before me in other proceedings.

The compensation has not been realized.

The order of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—*Bharut Chander Nath v. Jated Ali Biswas* (2) and *In the matter of the petition of Ram Padarath* (1) 16th July 1910  
are directly in point and are authority for holding that the process-server, on whose report, that the accused had obstructed him while executing a warrant in execution of a decree for custody of a wife and had removed the woman from his custody, the District Judge instituted criminal proceedings against the accused is not a person upon whose complaint or information the accusation was made and is not liable to pay compensation under section 250 of the Code of Criminal Procedure. The correctness of the rulings is possibly open to doubt, but they were delivered by Judges of great experience and legal attainments and I am not prepared to differ from them.

I set aside the order for compensation. The learned Sessions Judge has recorded in his referring order that compensation has not been realized. An order for refund is consequently unnecessary.

*Revision accepted.*

(1) (1904) *I. L. R.* 26 All, 183.

(2) (1892) *I. L. R.* 20 Cal, 481.



## No. 26.

*Before Hon. Mr. Justice Chevis.*

THE CROWN

*Versus*HARI SINGH, SALEKH CHAND, ABDUL BASIT AND  
IAJAZ HUSSAIN,—ACCUSED.

Criminal Revision No. 1463 of 1909.

*The Indian Railway Act, IX of 1890, sections 102, 108, 109 (2) and 120 (c)—forcible ejection of passenger.*

N. D. holding a 3rd class ticket was travelling in an intermediate carriage. At Ambala the accused three Railway officials not then on duty and a Railway Police constable, attempted to seat some passengers in the compartment in which N. D. was travelling. N. D. remonstrated alleging that the compartment was already over-crowded. N. D. either got out or was dragged out and a scuffle ensued between him and accused. On complaint the Magistrate convicted accused of an assault, finding at the same time that the compartment had not at the time [its full complement of authorized passengers.

*Held* by the Chief Court on the case being reported to it under section 438, Criminal Procedure Code, that N. D. had committed offences under sections 109 (2) and 120 (c) of the Railway Act and was liable to removal by any Railway servant and that accused were entitled to an acquittal.

*Held* also that the word passenger in the Railway Act includes a ticket-holder even before he has boarded the train.

*Case reported by H. A. Rose, Esquire, Sessions Judge, Ambala Division, with his No. 2527 G. of 1st December 1909.*

Broadway, Assistant Legal Remembrancer, for Crown.

Tek Chand, for accused.

*The facts of this case are as follows :—*

One Narain Das, formerly an Assistant Station Master at Muzaffarnagar, was travelling by the Hardawar Passenger Train on 9th April 1909. The train reached Ambala Station at about 7 A.M. The accused (1 to 3 ticket collectors on the North-Western Railway not on duty and No. 4 belonging to the Railway Police) attempted to seat some passengers in the intermediate class compartment in which Narain Dass, complainant, was travelling. The complainant remonstrated that the carriage was already overcrowded and obstructed the entry of other passengers. The accused on the other hand urged that there was sufficient room in the compartment and that the complainant had no right to resist them. On

this an altercation took place. The complainant charged the accused with using force and assaulting him, while the accused asserted that the complainant was the aggressor. The complainant also asserted loss of 20 sovereigns, 3 currency notes of Rs. 20 each and 5 or 6 rupees. The evidence also shows that the complainant was in possession of only a 3rd class ticket though he was seated in an intermediate class compartment, the entry into which by other passengers holding intermediate class ticket he resisted.

The accused, on conviction by Lala Bashambar Dayal, exercising the powers of a Magistrate of the 1st class, in the Ambala District, was sentenced by order dated 6th August 1909 under section 352 of the Indian Penal Code, to a fine of Rs. 10 each.

*The proceedings are forwarded for revision of the following grounds :—*

This is a test case and must clearly be submitted to the Chief Court for a ruling on the points raised in the learned Assistant Legal Remembrancer's petition for revision.

The convictions appear to me untenable. Complainant had only a 3rd class ticket and even if the intermediate compartment had been already full he at least had no right to be in it or to prevent passengers with intermediate tickets from being put into it.

On the facts as found by the Magistrate I think petitioners committed no offence. The complainant might not be guilty of an assault on a Railway official in the execution of his duty if the said official were off duty at the time, but I can not think the mere fact that the petitioners were off duty justified complainant in resisting their attempt to put into the carriage other passengers for whom there was room and who held tickets.

The case is an important one from the point of view of the Railway Administration and if the convictions are upheld the Railway Act may have to be amended. It would be intolerable if passengers could forcibly resist the entry into a partially empty carriage of passengers at least equally entitled to travel in it.

The fines are said to have been paid. The Magistrate has been directed to suspend payment of the Rs. 25 compensation to complainant pending order of the Chief Court.

The order of the learned Judge was as follows :—

14th May 1910.

CHEVIS, J.—The complainant in this case was travelling in an intermediate compartment. When at Ambala Cantonment Station the ticket collectors wanted to put some more people into the carriage, complainant objected, and tried to prevent more passengers from entering. What followed is not so clear as it might be. Either complainant got out or was forcibly dragged out and a scuffle took place between him and the ticket collectors, and complainant was handed over to the police. The Magistrate having convicted three ticket collectors and two constables of an assault and inflicted a sentence of fine, this application for revision has been made.

The Magistrate finds on the evidence that the carriage had not got its full authorized number of passengers. He also finds so I understand—that complainant resisted the entry of more passengers. He says, the complainant no doubt objected to the “coming in of more passengers and probably he also stood “against the door.” Then in my opinion he committed an offence falling under section 109 (2) and also under section 120 (c) of the Railway Act, and was liable to removal not only from the carriage but also from the Railway by any Railway servant. To keep persons who had paid for their tickets and wanted to enter the carriage waiting on the platform was clearly interfering with their comfort, and I certainly think, having regard to the way in which the term “passenger” is used in various sections of the Act (e.g. sections 102, 109 and 108) that a person who is a ticket holder is regarded as a “passenger” even before he has actually boarded the train. And such turbulent conduct was also interfering with the comfort of peaceable passengers already seated in the carriage. So it follows that if the complainant was forcibly ejected from the carriage, the Railway servants were within their rights. It is of course, obvious that in any such case the removal of the offender must not be caused by any more force than is actually necessary. In the present case I am not at all prepared to hold that any unnecessary force or violence was used. The evidence on both sides is not above suspicion of bias, but what appears clear is that no one suffered any hurt and I think that nothing more than a mere scuffle occurred. Bearing in mind that complainants own conduct in forcibly resisting the entry of more passengers was the beginning of the trouble, I do not see how on the evidence it can reasonably be held



to be proved that the petitioners were the aggressors or that they used unnecessary violence, and so I am of opinion that the conviction cannot stand.

In conclusion I note that the facts that the complainant was formerly an Assistant Station Master and that on this occasion he was travelling in an intermediate carriage with a third class ticket, and that he has embroidered his complaint with a story of robbery, which appears to be utterly false, are not at all creditable to him.

The conviction and sentence are set aside and the fines will be refunded.

## Full Bench.

No. 27.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Rattigan, and Hon. Mr. Justice Chevis.*

RE IN THE MATTER OF A PLEADER.

Civil Reference No. 10 of 1910.

*Legal Practitioners Act, XVIII of 1879, section 13 (c) and (d)—fee paid or payable—procuring employment—deception—ratification.*

Where the facts found were that during the absence from the station of A. A. an advocate, his clerk F. C. took a litigant J. S. who wished to file a suit and had come to retain R. C., to A. a Pleader, and told J. S. that A. was competent and would conduct the case well, that J. S. paid, A. 60 as his fee and that the latter then asked for and received Rs. 6 further as *munshiana* out of which A. paid Rs. 3 to F. C. and retained Rs. 3 for his own clerk.

*Held* by the Full Bench that the Rs. 3 paid by A. to F. C. were not paid out of a fee paid or payable to A. for his services within the terms of section 13 (c) Legal Practitioners Act XVIII of 1879, and that the case did not fall within section 13 (d) of the said Act inasmuch as there was no evidence of procuring or attempt to procure employment as Pleader or that J. S. had been deceived or had any misrepresentation made to him.

On return to the Division Bench (Johnston and Williams, JJ.) *Held* that in section 13 (c) of Act XVIII of 1879 the words "out of any fee" qualify only the words "consents to the retention of" and do not qualify "tenders" or "gives" and that A. was guilty of misconduct under clause (c) section 13 aforesaid, in that he gave F. C. Rs. 3 as a gratification for having procured him a client.

*Case referred by S. S. Harris, Esquire, Divisional Judge, Shahpur Division, dated the 26th January 1910.*

Bayan Petman, Government Advocate, for Crown.

Shadi Lal, Ishwar Das, Sukh Dial and Dwarka Das, for respondent.

The order of the Full Bench was delivered by—

23rd March 1910.

SIR ARTHUR REID, C. J.—The facts found are that during the absence from Z. of Mr. Ali Altaf, an Advocate of this Court, practising there, his clerk, Faqir Chand, took Jawahir Singh, who wished to file a suit and had gone to Z. to retain Lala Ram Chand, to A. a Pleader practising at Z.; that Faqir Chand told Jowahir Singh that A. had been an Extra Assistant Commissioner and would conduct the case well; that Jowahir Singh paid A Rs. 60 as his fee; and that the latter asked for Rs. 6 extra as "*munshiana*" (his clerk's fee), and that this sum also was paid by Jowahir Singh to A. who gave Rs. 3 to Faqir Chand as his share of the "*munshiana*," keeping Rs. 3 for his own clerk.

Two questions have been referred to us, on these facts, by the Division Bench.

(1) Whether the Rs. 3 paid by A to Faqir Chand were paid out of a fee paid or payable to A. for his services, within the terms of section 13 (c) of the Legal Practitioners Act, XVIII of 1879.

(2) Whether the case falls within section 13 (d) of the Act.

We have no hesitation in answering the first question in the negative. Jowahir Singh deposed as follows:—"I handed my papers to A. After inspecting them, he said that he would take Rs. 100. I said that I was a poor man and would pay Rs. 50. I was going to come away when he said give Rs. 60. I paid Rs. 60. Then he took Rs. 6 from me for his *munshi*, saying "that he would pay that to his *munshi*."

On this statement, which has not been contradicted, it is, in our opinion, impossible to hold that the Rs. 6, out of which Rs. 3 were paid to Faqir Chand, were paid or payable to A. for his services.

It was conceded at the hearing that the practice at the Lahore Bar is that a litigant pays counsel for his clerk, or pays to the clerk direct, about Rs. 10 per cent. of the fee paid to counsel, except where the fee is large, and that in the latter case the percentage is proportionately reduced. It is, of course, unfortunately possible that a clerk does not in all cases get the whole of the money paid as *munshiana*, but the sum is paid for the clerk and not for his employer. It is therefore not part of Counsel's fee,

The *munshiana* system is very similar to that in force in England, where a clerk is paid by his employer and receives fees from that employer's clients.

The second question must also, in our opinion, be answered in the negative.

The record contains no evidence that Faqir Chand was employed by A. to take clients to him.

Faqir Chand deposed that the object of taking a case to a Pleader was to obtain *munshiana* and that that was his object; that at Z. clerks took cases to their Pleaders, in order to get *munshiana*, and that, if they did not bring cases, Pleaders did not look upon them with favour; that while sitting at a watch makers shop he saw Jowahir Singh and entered into conversation with him and recommended him to retain A. that the latter's brother-in-law was at the shop and accompanied the party to A.

The record contains no evidence of direct or indirect procuring or attempt to procure employment as Pleader or of any remuneration having been given or promised to Faqir Chand by A. before Jowahir Singh was taken to him, and it does not contain any evidence that Jowahir Singh was deceived, or that any misrepresentation was made to him.

The record will be returned to the Division Bench.

The order of the Court was delivered by—

JOHNSTONE, J.—A new point has been raised with regard to the correct interpretation of section 13 (c), *viz*, whether the words "out of any fee, etc." do not qualify only "consents to the retention of" and not "tenders" or "gives." This seems to us a suggestion possessing some force. 8th April 1910.

Messrs. Ishwar Das and Dwarka Das ask for time to consider the point which has been sprung upon them

Tuesday, 12th, at 10-30. Inform Government Advocate.

The judgment of the Division Bench, consisting of Hon. Mr. Justice Johnstone and Hon. Mr. Justice Williams was delivered by—

JOHNSTONE, J.—We have now heard the point raised in our order of 8th April argued and our opinion is that section 13 (c), Legal Practitioners Act, 1879, is applicable to the present case and renders the conduct of A. punishable. 12th April 1910.

The history of this case has been as follows. On 14th May 1909 on certain information received from two Pleaders the District Judge of Z proceeded to serve upon A. copy of a charge of unprofessional conduct as a Pleader and on 2nd and 3rd June considered his objections and overruled them and ordered his personal appearance on 10th June. Against these orders A. moved this



Court, which, on 21st August 1909, while finding that the District Judge acted within his jurisdiction, cancelled the order of 14th May and remanded the case to him with an order that he should make a preliminary enquiry and come to a clear finding that there is a *prima facie* case within the four corners of Section 13 (c) of the Act, and then issue notice. The District Judge acted upon this instruction and at last reported to the Divisional Judge that the Pleader had been guilty of misconduct. The Divisional Judge forwarded this report with the remark that, inasmuch as the money paid by A. to Faqir Chand was paid out of a sum paid to the former for his munshi and not for himself, section 13 (c) did not apply and no action could be taken against the pleader. The matter was argued before us, Mr. Petman (on behalf of the Government Advocate) arguing that both Section 13 (c) and Section 13 (d) applied to the case, and the Pleader's counsel contending the opposite. We found the facts to be that Faqir Chand, munshi of another Pleader, brought the client to A.; that Rs. 60 was fixed and paid as fee to A. that Rs. 6 additional was handed by the client to A.; as *munshiana*; that Faqir Chand wrote out the petition for A. who gave him Rs. 3 not for writing the petition but as reward for introducing a client.

Looking at the words in section 13 (c) "out of any fee paid "or payable to him for his services," we felt some doubt whether it could be said that the Rs. 3 aforesaid came out of such "fee," and we also had some doubts as to the applicability of clause (d), should clause (c) be held inapplicable. We therefore referred, these two points to a Full Bench which disposed of them by an order of March 23rd, holding that section 13 (d) could not be applied in the present case, inasmuch as there was no evidence of a previous arrangement between A. and Faqir Chand for the procuring by the latter of clients for the former, and also ruling that the Rs. 3 aforesaid could not be said to have come out of any fee paid to A. for his services.

On the case returning to us, section 13 (c) came to be looked at from a new point of view. In referring the aforesaid question regarding it to the Full Bench we rather assumed that the "words out of any fee.....services" qualified "tenders" and "gives" as well as "consents to the retention of" but examination of the structure of the clause shows that this assumption was hardly correct. After hearing arguments against the new suggestion and considering the arrangement of the phrases in the clause, we are firmly of opinion that, while it would have been clearer had the Legislature put a comma after "of" and before "any gratifications," the real meaning of the clause is this—

“Who tenders or gives any gratification for procuring or having procured the employment, etc., or consents to the retention out of any fee paid or payable to him for his services, of any gratification for procuring, etc.”

It seems to us impossible to hold on the wording that the Legislature intended that a Pleader who himself paid a sum of money to a procurer of clients should not be punishable unless the money came out of his “fee.” We have considered section 36 of the unamended Act and have also looked at the statement of objects and reasons at page 149, Part V, Gazette of India, 7th March 1896; but we can find there no reason to doubt that the real intention of the introduction of the qualifying words “out of any fee, etc.” was merely to make it clear that a Pleader should not be held punishable except for his own acts; that is to say, he was to be punishable if he tendered gratification to a procurer of clients, if he gave gratification to such a person, and if he allowed that person to retain part of the “fee,” but he was not to be punishable, if the client should by a private arrangement, in which the Pleader had no part, pay a sum of money to such person aforesaid.

It is contended that the case is merely one of imperfect drafting and that the real intention was to make the words “out of any fee, etc.” qualify the whole clause, the order of phrases being due to the difficulties of the English language; but surely, if it had been intended so, it would have been easy to have inserted the qualifying words between “who” and “tenders”? Their position between “retention” and “of” seems to us to conclude the controversy.

It is clear, then, that A. has transgressed clause 13 (c), for he gave to Faqir Chand Rs. 3 as a gratification for having procured him a client, and has become liable to suspension or dismissal. Considering the doubts regarding the applicability of the clause to such cases and the fact that the point now before us does not seem ever to have been plainly ruled, we do not think a severe sentence is necessary. It will be sufficient, we think that we should pronounce A. guilty of misconduct under clause (c), Section 13, Act XVIII of 1879, in that he gave Faqir Chand Rs. 3 for having procured him a client, and that we should suspend A, from practising as a Pleader for 2 months.

## No. 28.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and  
Hon. Mr. Justice Johnstone.*

THE CROWN

*versus*

(1) DEWA SINGH, (2) HIRA SINGH AND (3) JIWAN  
SINGH,—ACCUSED.

Criminal Revision No. 323 of 1910.

*Criminal Procedure Code, Act V of 1898, sections 110 and 121—forfeiture  
of security bond where offence committed in Native State.*

Where a person placed on security under section 110, Criminal Procedure Code 1898, committed within the period of his security bond an offence in a Native State against a subject of the King-Emperor.

*Held* that his security could not be forfeited unless there was on the record proof of the commission of the offence.

*Case reported by W. A. Le Rossignol, Esquire, Sessions Judge, Amritsar Division, with his No. 306 of 2nd March 1910.*

Government Advocate, for Crown

Mul Chand, for Accused

*The facts of this case are as follows :—*

The accused was placed on security under section 110 Criminal Procedure Code, and his security was forfeited on the ground that he committed an offence in Kapurthala State,

The accused on conviction by Mr. E. J. Stephen, exercising the powers of a Magistrate of the 1st class in the Amritsar District, was sentenced, by order, dated 23rd November 1909 and his security to the amount of Rs. 1000, was forfeited, the said order regarding the forfeiture of security being upheld by the District Magistrate by order dated 1st November 1909.

*The proceedings are forwarded for revision on the following grounds :—*

Dewa Singh was bound down under section 110, Criminal Procedure Code to be of good behaviour. Subsequently he was convicted in Kapurthala territory under section 411, Indian Penal Code. His security has been forfeited, and it is urged that as the offence took place in Kapurthala, the forfeiture is illegal.



The District Magistrate, with reference to section 121, Criminal Procedure Code, holds that the words "wherever it may be committed" include an "offence" in a Native State.

I am very doubtful of the correctness of this view for the Code does not, except in two or three special cases, purport to deal with offences committed outside of British India.

By his bond, the accused undertakes to be of good behaviour to His Majesty and to all his subjects.

I have sent for the Kapurthala file and find that the person whose stolen property was found in accused's possession for which possession he was convicted, was Mussamat Kassi, a British subject of Dulo Nangal in Amritsar District.

"Offence" in section 4 (0) of the Code is defined as any act made punishable by any law for the time being in force, but that I take to mean "in force in British India." Now the offence defined in section 411, Indian Penal Code, is made punishable in British India, but in this case the offence was not established in British India. As the case is of interest, I submit it for orders to the Chief Court.

It is of course very undesirable that bad characters should be immune from the results of their acts, merely by altering the venue of their crimes to a Native State, but it must be so, unless the law clearly provides for it. Cf. also section 8 of Act XXI of 1879, but this had been amended by XV of 1903, and indeed the Act has no real application to this case.

The order of the Court was delivered by —

JOHNSTONE, J.—The facts of this case in so far as they need be stated for the purposes of this revision are that the man Dewa Singh, who was under security for good behaviour under section 110, Criminal Procedure Code, was convicted of dishonestly receiving stolen property (section 411, Indian Penal Code) by a Court of the Kapurthala State. Upon this Mr. Stephens, 1st class Magistrate, Amritsar, declared the security forfeited, and this order was upheld by the District Magistrate.

1st July, 1910.

The case comes before us on a reference by the learned Sessions Judge, the question for decision being whether forfeiture of security can lawfully be made merely on proof of the conviction aforesaid. We are of opinion that

it cannot, though we are not inclined to go the whole length Mr. Mul Raj would have us go. He contends that not only is there in the present case no proper proof of the commission by Dewa Singh of the offence of dishonest receipt of stolen property, but that, even if there was such proof, there would be no ground for forfeiture of security, inasmuch as the offence was not committed in British India. We assent to the first proposition, but not to the second.

Mr. Mul Raj points to section 1 (2), Criminal Procedure<sup>6</sup> Code, but this does not seem to us to affect the question. In Section 40, Indian Penal Code, "offence" is defined as "a thing punishable by this Code," and section 4 of the Code makes the provisions of the Code applicable to any offence committed by any native Indian subject of His Majesty in any place without or beyond British India. It seems to us therefore that the phrase "offence punishable with imprisonment, wherever it may be committed," found in section 121, Criminal Procedure Code, must cover the dishonest receipt of stolen property in the State of Kapurthala. Nor need the form of the bond itself cause any difficulty in the present case, see Schedule V, Criminal Procedure Code, Form XI. The owner of the stolen property was a British subject of Amritsar District, and thus the words "to be of good behaviour to His Majesty and to all His subjects" are fully met.

The point is suggested to us that *Muhammad Yar v. The Empress* (1) and *The King-Emperor v. Khan Muhammad* (2) respectively lay it down that a previous conviction by the Court of a Foreign State, or a previous conviction under a special or local law, cannot work enhancement of sentence under section 75, Indian Penal Code. But we perceive a clear distinction between those cases and the present one. Under section 75, Indian Penal Code, the ground for enhancement, the circumstance which authorizes enhancement, is previous conviction of an offence of a certain kind, while under section 121, Criminal Procedure Code, all that need be proved is the "commission of any offence punishable with imprisonment." We could not take the conviction in Kapurthala as sufficient, but proof of commission of an offence punishable under section 411, Indian Penal Code, the owner of the stolen property being a subject of the King-Emperor, seems to us sufficient to satisfy both section 121, Criminal Procedure Code, and the terms of the security bond.

(1) 2 P.R. 1884, Cr. (2) 17 P.R. 1904 Cr.

In these circumstances, inasmuch as there is on the record no proof of commission by Dewa Singh of the offence specified above, we must set aside the order of forfeiture and order retrial of the case by the 1st class Magistrate, it being understood that forfeiture cannot lawfully be ordered unless and until there is on the record legal evidence that Dewa Singh did actually commit an offence under section 411, Indian Penal Code.

*Revision accepted.*

### No. 29.

*Before Hon. Mr. Justice Scott-Smith.*

NANKU *Alias* MUHAMMAD DIN (CONVICT),—PETITIONER

*Versus*

THE CROWN,—RESPONDENT.

Criminal Revision No. 630 of 1910.

*Criminal Procedure Code, Act V of 1908, sections 110 and 123—Accused called upon to furnish security for good behaviour—failure to furnish security—sentence of imprisonment subject to confirmation by the Sessions Judge.*

Where a person called upon by the District Magistrate to furnish a bond under section 110, Criminal Procedure Code, 1898, for a period of three years, failed to furnish the security demanded, and the District Magistrate sentenced the accused to rigorous imprisonment for three years, subject to confirmation by the Sessions Judge, and the latter officer confirmed the order demanding security.

*Held*, that the procedure adopted by the District Magistrate was not that laid down in section 123 of the Code of Criminal Procedure, 1898.

*Held* also that it was the duty of the Sessions Judge in the case of a reference under section 123 of the Code of Criminal Procedure to consider the evidence produced and to pass orders after doing so.

*Held* further that there being no evidence to show that since his last conviction the accused had done anything that would justify an order under section 110 of the Criminal Procedure Code, security should not have been demanded from him.

*Petition under section 439 of the Criminal Procedure Code for revision of the order of Khan Bahadur Maulvi Inam Ali, Sessions Judge, Jhelum Division, dated the 19th February 1910.*

The judgment of the learned Judge was as follows :—

SCOTT-SMITH, J.—This is an application for revision of the order of the District Magistrate of Jhelum calling upon Nanku to furnish a bond under section 110, Criminal Procedure Code, for a period of three years. The security required not having

16th July 1910.



been furnished the District Magistrate sentenced the accused to 'three years' rigorous imprisonment subject to confirmation by the Sessions Judge. Upon this the latter officer passed the following order. "I confirm the District Magistrate's order by which "Nanku is directed to furnish a bond in Rs. 200 with two "sureties to be of good behaviour for three years."

The procedure adopted by the District Magistrate upon Nanku's failure to furnish security was not that laid down in the Code of Criminal Procedure. He had no authority to order the accused to be imprisoned for three years subject to the Sessions Judge's confirmation.

The law is laid down in section 123, sub-sections (2) and (3), and is as follows :—

"When such person has been ordered by a Magistrate to "give security for a period exceeding one year, such Magistrate "shall, if such person does not give such security as aforesaid, "issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge, or, if such Magistrate is "a Presidency Magistrate, pending the orders of the High "Court and the proceedings shall be laid before such Court.

"Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence "which it thinks necessary, may pass such order on the case "as it thinks fit.

"Provided that the period (if any), for which any person "is imprisoned for failure to give security, shall not exceed three "years."

The gist of the above is that the Magistrate commits the person, from whom security has been demanded, to prison and sends the proceedings to the Sessions Judge for disposal as he thinks fit. There is nothing in the section about the Magistrate's order being confirmed.

On the merits the order of the District Magistrate cannot be maintained. Only one witness was examined for the prosecution, viz. Gopal Singh, Sub Inspector, whose evidence was very briefly recorded and was merely to the effect that accused had been three times convicted of offences against property and three times of absence without leave. The record shows that the latter convictions were for offences under section 176, Indian Penal Code.

Nanku's last conviction for an offence against property was on 14th January 1905 and there is no evidence except the

vague statement of the Sub-Inspector to show that since he got out of jail he has been a bad character, or has done anything that would justify an order under section 110, Criminal Procedure Code. The Superintendent of Police in his report says there is more than sufficient evidence against him as will be seen from the list of searches in 1907, 1908 and 1909. No evidence was taken by the Magistrate about these searches and no witnesses, except the Sub-Inspectors were examined in regard to his behaviour.

I do not understand how the Magistrate or Sessions Judge considered the evidence to be sufficient. I would also point out that it is the duty of a Sessions Judge, in the case of a reference under section 123 of the Code of Criminal Procedure, to consider the evidence and to pass an order after doing so. He should not, just as a matter of course, and without regard to the evidence, send to prison the person who has failed to give the security ordered.

I accept the revision and set aside the orders of the Sessions Judge and the Magistrate and direct the immediate release of Nanku.

*Revision allowed.*

### No. 30.

*Before Hon. Mr. Justice Scott-Smith.*

THE CROWN—PETITIONER,

*Versus*

SUNDAR SINGH,—(COMPLAINANT),—RESPONDENT.

Criminal Revision No. 9 of 1910.

*Criminal Procedure Code, Act V of 1898, section 250—Compensation to accused when case compromised—*

Where S. S. prosecuted L. S. under sections 323 and 448, Indian Penal Code and though summons had not been served on him L. S. appeared and a compromise was filed and accepted, but the Magistrate subsequently cancelled the order accepting the compromise discharged the accused and awarded L. S. Rs. 15 as compensation.

*Held* by the Chief Court on the case being reported by the Sessions Judge that to justify the award of compensation under section 250 Criminal Procedure Code, the Magistrate must himself acquit the accused, but where a case is compounded the composition itself has the effect of an acquittal and compensation cannot legally be awarded.

*Case reported by H. A. Rose, Esquire, Sessions Judge, Ambala Division, with his No. 2669 G, dated the 15th December 1909.*

*The facts of this case are as follows:—*

Sundar Singh prosecuted Lal Singh, Qanungo, under sections 323 and 448, Indian Penal Code, alleging that he owed money

to Lal Singh, that Lal Singh came to his house on October 13th and demanded payment; that Lal Singh forced his way into complainant's house, caught complainant by the beard and slapped him on both cheeks.

Lal Singh denied the charge saying that he never went to complainant's house on 13th and that the complaint has been lodged to prejudice his chance of success in the civil suit.

A compromise was also put in.

The accused was discharged by Mr. B. Glancy, exercising the powers of a Magistrate of the 1st class in the Simla District, by order, dated 25th October 1909, and the complainant was ordered to pay Rs. 15 as compensation, under section 250 of the Criminal Procedure Code, to the accused.

*The proceedings are forwarded for revision on the following grounds :—*

This case is referred for a ruling on a point which has not yet, as far as I can ascertain, been decided in this Province. The question is whether a Court can award compensation in a criminal case, which is compounded.

In this case the complainant filed a complaint, and the accused was summoned, but complainant did not deposit any process-fee. Accused however attended of his own accord and an order was then passed or drafted accepting the compromise. This order was however cancelled by the Magistrate who passed an order in English in due form. *Hurphul v. Nanku* <sup>(1)</sup> etc., cited by petitioner's counsel, do not apply.

It is however contended by him on the authority of Bombay High Court Judgments Nos. 8 of 1898 and one dated 26th July 1894, that in a case which has been compounded the Magistrate cannot award compensation. I have no copies of these Bombay Judgments to refer to and there are no reported cases in the Indian Law Report for Bombay.

I am however doubtful whether the contention is correct. Under section 345, Criminal Procedure Code, a composition in the case of a compoundable offence has the effect of an *acquittal* (clause 6 of section 345). The accused was thus *acquitted* and under section 250, Criminal Procedure Code, the Magistrate would appear to have clear jurisdiction to make the complainant pay him compensation.

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<sup>(1)</sup> 3 P. R. 1906, Cr.



On the merit there is nothing to be said. Complainant owed money to accused and a civil suit was pending. The complain as the Magistrate found, was intended to prejudice accused in the prosecution of his suit.

I do not recommend revision of the Magistrate's order, but as the legal point involved is a novel one, I refer the case for its decision. The compensation has been levied on 27th October 1909.

The order of the learned Judge was as follows :—

SCOTT-SMITH, J.—The point referred by the Sessions Judge 23rd April 1910. is whether when a Criminal case is compounded a Magistrate can allow compensation to the accused under section 250 of the Code of Criminal Procedure.

In *The Empress v. Khushali Ram* <sup>(1)</sup> it was held that to justify the award of compensation under section 250 of the Criminal Procedure Code, the Magistrate himself must acquit the accused under section 245, or 247 of the Code, but where a case is compounded under section 345 the composition itself has the effect of an acquittal and compensation cannot be legally awarded.

In the present case on the day fixed for hearing the evidence, the parties appeared in Court and filed a deed of compromise.

The accused's statement was not recorded as to whether he agreed to the compromise, but the deed purports to be signed and thumb-marked by him, and as he has not appeared to-day and has not at any time repudiated the compromise, I must assume that he did agree to it. I am further supported in this view by the fact that accused appeared before the Magistrate along with complainant though summons had not been served upon him.

As the offences charged were compoundable the Magistrate was wrong in refusing to allow them to be compounded. He should at once have acquitted the accused and in accordance with the above-mentioned ruling he had no power to order the complainant to pay compensation.

I therefore accept the revision and set aside the order awarding Rs. 15 as compensation to Lal Singh.

*Revision accepted.*

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(1) 19 P. R. 1888 Cr.

## No. 31.

*Before Hon. Mr. Justice Chevis.*

LEKHRAJ,—(CONVICT),—PETITIONER,

*Versus*

THE CROWN—RESPONDENT.

Criminal Revision No. 230 of 1910.

*Jurisdiction—Magistrate convicting of a minor offence where a more serious offence had really been committed—Indian Penal Code, Act XLV of 1860, sections 420, 467 and 468.*

The complaint was that L. had forged a *hundi*. The case was tried by a first class Magistrate not exercising enhanced powers, who, finding that the forgery had been committed, framed charges under sections 420 and 468 of the Indian Penal Code and convicted L. on those charges.

*Held*, that, the document in question being a valuable security, the offence, if committed, was one falling under section 467, and that such a case, being triable only by a Court of Sessions, could not be disposed of by a Magistrate of the first class not exercising enhanced powers otherwise than by an order of discharge or by committal to Sessions, the Magistrate having no power to assume further jurisdiction by framing charges of minor offences included in the major offence.

*Petition under sections 435–439 of the Criminal Procedure Code for revision of the order of C. L. Dundas, Esquire, Sessions Judge, Rawalpindi Division, dated the 12th February 1910.*

Gray and Beechey for Petitioner.

Gobind Das for Respondent.

The judgment of the learned Judge was as follows :—

23rd April 1910.

CHEVIS, J.—The petitioner has been convicted by a first class Magistrate and sentenced under sections 420 and 468. The offence with which he stands charged is forging a *hundi* for the purpose of cheating. Now a *hundi* is a valuable security so the offence charged really falls under section 467, and the case is triable only by the Sessions Court or by a Magistrate invested with enhanced powers. The fact that the offence includes a minor offence which is triable by an ordinary 1st class Magistrate no more gives an ordinary 1st class Magistrate power to deal with the case than the fact that a man who commits murder also commits grievous hurt gives an ordinary Magistrate jurisdiction to dispose of a charge of murder.

I set aside conviction and sentence and all proceedings on appeal in the Sessions Court, and also all proceedings in the Magistrate's Court as far back as, and including, the framing of the charge. The case is returned through the District

Magistrate, who can, if he thinks fit, transfer the case to his own file or to the file of any Magistrate invested with section 30 powers. If the case is not so transferred, the Magistrate will proceed with the case, but he can only dispose of it either by a committal to Sessions or by an order of discharge. At request of petitioner's counsel I note that it is open to the District Magistrate, if he thinks fit, to transfer the case to his own Court and then to pass an order of discharge, but I note at the same time that nothing in the present order is to be taken as an expression of any opinion on the merits of the case. The petitioner will remain on bail as at present till further orders are passed by the Magistrate or by any other Court to whom the case may be transferred.

### No. 32.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*

**BHANA—(CONVICT)—PETITIONER,**

*Versus*

**THE CROWN—RESPONDENT.**

**Criminal Revision No. 201 of 1910.**

*Penal Code, Act LXV of 1860, section 498—Enticing away married woman—Complaint—Criminal Procedure Code, Act V of 1898, sections 4 (h) and 199—Report of Police Officer.*

*Held, following Jit Mal v. Empress <sup>(1)</sup>, Tara Prosad Laha v. Emperor <sup>(2)</sup>, and Emperor v. Isap Mahomed <sup>(3)</sup>, that the report of a Police Officer is not a complaint within the terms of sections 199 and 4 (h) of the Code of Criminal Procedure, and that a conviction under section 498, Indian Penal Code, where there has been no complaint to the Magistrate by the husband or guardian, is not maintainable.*

*Petition under section 439 of the Criminal Procedure Code for revision of the order of H. Scott-Smith, Esquire, Sessions Judge, Ferozepore Division, dated the 18th January 1910.*

**Fazal-i-Elahi, for petitioner.**

**Nemo, for respondent.**

The judgment of the learned Judge was as follows :—

SIR ARTHUR REID, C. J.—The plea that the conviction, under section 498 of the Penal Code, by the learned Sessions Judge on appeal, is bad, because there was no complaint by the husband or guardian of an offence punishable under that section, as provided in section 199 of the Code of Criminal Procedure, has force. 7th Sept. 1910.

<sup>(1)</sup> 4 P. R. 1888, Cr. <sup>(2)</sup> (1903) I. L. R. 30 Cal. 910 P. B.  
<sup>(3)</sup> (1907) I. L. R. 31 Bom. 218.



*Jit Mal v. Empress* <sup>(1)</sup>, *Tara Prosad Laha v. Emperor* <sup>(2)</sup>, *Emperor v. Isap Muhomed* <sup>(3)</sup> are directly in point, and are authority for the conclusion that the procedure adopted by the learned Sessions Judge was erroneous and the conviction bad. In the Calcutta case *Jatra Shekh v. Reazat Shekh* <sup>(4)</sup> was referred to and distinguished.

The authorities cited lay down the rule that the report of a Police Officer is not a complaint within the terms of section 199, and here there was no complaint to a Magistrate by the husband or guardian of an offence punishable under section 498 of the Penal Code.

I set aside the conviction and sentence under that section on the ground only that no complaint within the terms of section 4 (*h*) had been made by the father and guardian, and I leave the father and guardian to take such steps as they may be advised.

To this extent the application is allowed.

*Revision allowed.*

### No. 33.

*Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.*

CROWN—COMPLAINANT,

*Versus*

BISHEN DAS—ACCUSED.

Criminal Revision No. 244 of 1909.

*Criminal Revision by Chief Court against charges framed by a Magistrate—Criminal Procedure Code, 1898, section 439—matters previously adjudicated in Civil Court—proper attitude of Criminal Courts where matter is more appropriate for decision by a Civil Court.*

*Held*, dissenting from *Charoobala Dabee v. Barendra Nath Mosamdar* <sup>(5)</sup> and distinguishing *Azim Khan v. Empress* <sup>(6)</sup> that the Chief Court can as a court of revision under section 439 of the Code of Criminal Procedure, 1898, interfere with the order of a Magistrate charging an accused person with an offence although that order is not appealable.

*Held* also, that save for very exceptional reasons a Criminal Court should not go behind the finding of a Civil Court and convict of cheating and fraud a person who upon the very same facts has succeeded in satisfying a Civil Court upon the merits of the case of the justice of his claim.

<sup>(1)</sup> 4 P. R. 1888, Cr.

<sup>(2)</sup> (1903) I. L. R. 30 Cal. 910 F. B.

<sup>(3)</sup> (1907) I. L. R. 31 Bom. 218.

<sup>(4)</sup> (1893) I. L. R. 20 Cal. 483.

<sup>(5)</sup> (1900) I. L. R. 27 Cal. 126.

<sup>(6)</sup> 45 P. R. 1885, Cr.

Held further, that it is a very sound general principle and one to be observed by all Magistrates that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court.

*Case reported by Captain A. A. Irvine, Additional Sessions Judge, Lahore Division, with his No. 61 of 19th January 1909.*

Government Advocate, for Crown.

Ganpat Rai, for accused.

*The facts of this case are as follows :—*

It is alleged that on or about 8th August 1908 Bishan Das dishonestly induced Messrs. Clark and Kirke, N.-W. Railway, to make over to petitioner two valuable securities (promissory notes) for Rs. 200 and Rs. 100 respectively, for which they had not received the full consideration, though they signed them on the understanding that Rs. 300 were to be made over by petitioner to them and a Mr. Johnston, whereas petitioner really only made over Rs. 45 but dishonestly concocted proof that the whole of Rs. 300 had been paid.

Mr. Connolly, exercising the powers of a Magistrate of the 1st Class in the Lahore District, by order, dated 27th November 1908, framed a charge under section 421 of the Indian Penal Code, to the above effect against the petitioner Bishan Das.

*The proceedings are forwarded for revision on the following grounds :—*

This is a petition for revision praying that the charge framed on 27th November 1908 by Mr. Connolly, 1st Class Magistrate of Lahore, against the petitioner Bishan Das in certain criminal proceedings, should be quashed on the grounds that the charge does not disclose a criminal offence; that the proper remedy was by civil suit and that a Civil Court had already granted petitioner a decree on a claim on two promissory notes. The charge framed by the Magistrate is one for an offence under section 420, Indian Penal Code, to the effect that the petitioner on or about the 8th August 1908, dishonestly induced Messrs. Clark and Kirke, N.-W. Railway, to make over to petitioner two valuable securities for Rs 200 and Rs 100 respectively, for which they had not received the full consideration though they signed them on the understanding that Rs. 300 were to be made over by petitioner to them and a Mr. Johnston, whereas petitioner really only made over Rs. 45, but dishonestly concocted proof that the whole Rs. 300 had been paid,

I must first note that when the petition came before me or hearing the complainant-respondent Clark only appeared.

He did not mention that he had engaged any counsel, and after hearing petitioner's counsel, he merely stated that he had brought a true case, and (in reply to my questions added that he had taken no action against the Small Cause Court decree against him in respect of which his pay had been attached) because he had been advised by counsel that if a conviction were secured in the criminal case, the civil proceedings would *ipso facto* collapse. Later in the day his counsel (Mr. Vaughan) appeared and informed me that he only wished to urge that a petition for revision could not lie, relying on Criminal Ruling *Azim Khan v. Empress* (1). The complainant-respondent Kirke seems to have disappeared and his whereabouts have not been ascertained. It appears that both his and Johnston's pay has also been attached and that no action has been taken by either of these persons against the Small Cause Court decree. As regards *Azim Khan v. Empress* (1) I do not consider that it applies to the present case. Respondent's counsel has apparently overlooked the fact that in that case *no charge had been framed* and it referred only to interlocutory orders. In considering whether I should accept this petition I have read carefully *Jagat Chandra Mozumdar v. Queen-Empress* (2) especially the remarks commencing at the top of page 791. In my opinion those remarks apply very materially to the present proceedings. I have also read (both in this petition and in my previous order staying criminal proceedings pending decision of the civil suit) *Mohkam Din v. The Crown* (3) Criminal Revision No. 1087 of 1904, and I think the last two lines of that decision of the Hon'ble Mr. Justice Rattigan do apply to the present case. I do not think that P. L. R. (Criminal) of 1884 cited for petitioner applies.

My reasons for ordering stay of the criminal proceedings pending decision of the suit in the Small Cause Court can be seen from my order of 15th October 1908. On the 17th October 1908, the Small Cause Court gave decree against Johnston (who confessed judgment), Clark and Kirke on the Rs. 200 promissory note and against Clark and Kirke on the Rs. 100 promissory note. That decree has never been challenged. On the conclusion of the civil proceedings the criminal proceedings recommenced, and by an order of 26th November 1908 the Hon'ble Mr. Justice Robert-

(1) 45 P. R. 1885, Cr.

(2) (1899) I. L. R. 26 Cal. 786.

(3) P. L. R. 1905 summary of recent cases No. 1.



son declined to interfere, but said "the Criminal Court will of course consider all the facts of the case including the facts of the decision of the civil suit which may be decisive in the matter when the case comes before it." This order was passed, however, before any charge had been framed against accused-petitioner.

Having been carefully through the evidence recorded by the Magistrate and the various documents on file, I am not of the opinion that there were sufficiently good grounds for framing a charge against the petitioner. And I say this bearing in mind that Johnston confessed judgment in the civil suit, that no proceedings have been taken to upset that decree in spite of pay having been attached, that Kirke has apparently lost entire interest in the matter, and that Johnston has admitted in writing that "the full amount" was paid in his presence to himself, Clark and Kirke. Johnston and Kirke were Guards on the N.-W. Railway and Clark was a Gate Sergeant. Their statements to the Magistrate are any thing but convincing. All three are alleged to have gone on August 8th, 1908, to petitioner, a money-lender, to raise a loan of Rs. 300. Two promissory notes were executed for Rs. 200 and Rs. 100 respectively, though statements differ somewhat as to who wrote them out and petitioner is alleged to have paid only Rs. 45 at the time and to have promised to pay the balance next day, but not to have done so. On the back of petitioner's letter to Johnston, dated 11th August 1908, we have the aforesaid admission in writing by Johnston that the money was paid in full and it is noticeable that Kirke and Clark never attempted to sue Johnston for the money due to them nor though they at one time endeavoured to make out that he was Bishan Das's confederate have they included him as an accused in the criminal case. Johnston has endeavoured before the Magistrate to make out that he wrote his admission on the back of petitioner's letter when in a state of hopeless intoxication, but not only is the writing not that of an intoxicated man, but we see that Johnston never took any action when he came to his senses and confessed judgment in the civil suit. Long statements of Clark and Kirke have been recorded by the Magistrate, but from them we find that though they alleged a knowledge that they were being swindled within a day or two after the date when the promissory notes were executed. No report was even made to the Lahore police until the 17th or 18th of August (their letter to the Inspector of Police, Anarkali, bears no English date, but they therein assert that "on the 9th instant" petitioner got them

to sign a bond for Rs. 300). The reasons they give for not taking more rapid action are extremely weak as are Johnston's as to why he confessed judgment in the civil suit. Kirke in his statement to the Magistrate has admitted an assault on Johnston during which he took some money from him, but even if he and Clark afterwards came to the conclusion that Johnston had never been paid the money by petitioner, we have Johnston's own admission that payment was made in full, and the result of the civil suit in which case the remedy lay in a civil suit against Johnston possibly, but not in a criminal case against petitioner. The statement of the witness Simpson is anything but convincing and he has admittedly been sued himself by the petitioner, who has twice had his pay attached. The petitioner-accused in his statement to the Magistrate asserted that he had paid the Rs. 300 to Johnston (by 20 sovereigns) in the presence of Kirke and Clark afterwards making over 7 of them to Kirke and telling them to settle up the difference among themselves. According to his statement on August 10th Kirke and Clark came to his house under the influence of drink and told him to take back his money and return the promissory notes. He declined to return the documents as they did not produce the money and the next day sent letter to Johnston who wrote his admission on the back of it. On the 15th Kirke, Clark and Johnston wanted to raise a further loan and on petitioner's declining to lend more till the first debt was paid off, said they would pay him out. On the 17th August petitioner learnt that Kirke had resigned his appointment and so instructed a pleader to file the civil suit. This seems to me to square with the fact that it was not until the 17th or 18th of August that Clark and Kirke made their first report to the police.

All these facts cause me to think that there are no good grounds for framing a charge under section 420, Indian Penal Code, against the petitioner and for these reasons I accept the petition for revision and forward the proceedings to the Chief Court, under section 438 of the Criminal Procedure Code with this report and the recommendation that the charge framed by the Magistrate and criminal proceedings against the petitioner be quashed.

The order of the learned Judge referring the case to a Division Bench was as follows:—

11th May 1909. ROBERTSON, J.—The Government Advocate appeared in this case on behalf of Government and raised a point of importance

that this Court as a Court of Revision under the Criminal Procedure Code had no power to interfere to quash a prosecution on the merits when the Magistrate had drawn up a charge after hearing evidence for the prosecution. As the point is one of importance and there is not much direct authority and it has been raised under the instructions of Government, I think it best to refer the matter to a Division Bench.

The judgment of the Court was delivered by —

RATTIGAN, J.—The facts of this case are fully set forth in 28th May 1909. the Sessions Judge's order of reference, dated the 19th January last.

The only two questions before us are (1), whether it is competent to this Court, acting under sections 435—439 of the Criminal Procedure Code, to interfere with an order of a Magistrate of the first class charging a certain person with an offence; and (2), whether if this Court has such power, it should be exercised in the present case.

The facts, as we have stated, are detailed in the learned Sessions Judge's order and we need say no more here than that the present respondent is charged under section 420, Indian Penal Code, with having committed an offence thereunder, though upon precisely the same state of facts and the same evidence the respondent has succeeded in obtaining a decree in his favour in the Civil Court against the present complainants. It is true that this decree was obtained in the Small Cause Court, but it is not denied that the latter Court was the proper, and indeed the only, tribunal to adjudicate upon the civil dispute between the parties. We have only to add that no imputation is made against the *bonâ fides* of the Small Cause Court Judge, who heard and determined the suit. The first question then for our consideration is, whether this Court can, as a Court of Revision in the exercise of powers conferred upon it by the Code of Criminal Procedure, interfere with the order of a Magistrate charging an accused person with an offence. The learned Government Advocate contends in support of his argument to the contrary that under section 439 of the Code, the High Court, as a Court of Revision, has no power to interfere with orders in respect of which no appeal would lie under the Code, and that it has only such powers as are conferred on an Appellate Court under (e. g.) section 423. An order charging a person with an offence is not open to appeal, and as an Appellate Court could not deal with such an order, the argument is that a High Court cannot, under the



provisions of section 439, interfere therewith. This argument is supported by the judgment of the Calcutta High Court in the case of *Charoobala Dabee v. Barendra Nath Mozumdar* <sup>(1)</sup> but with every respect we are unable to accept the opinions of the learned Judges in that case upon this point. Obviously those opinions were mere *obiter dicta* and not necessary for the decision of the question actually before the High Court, but quite apart from this objection, we find it impossible to accept the reasoning upon which the learned Judges based their opinions. They admit that under section 135 of the Code, certain judicial officers are entitled to send for the records of Subordinate Courts for the purpose of satisfying themselves "as to the correctness, legality or propriety" of such proceedings, but they deny that the officers who have power to send for such records have "powers in regard to the correction of errors so found." The results of this decision would be most anomalous. We are not here concerned with the powers conferred on Sessions Courts or District Magistrates under section 436, 437 or 438; we are dealing solely with the case in which the High Court sends for a record under section 435, with a view to satisfying itself of the correctness, legality or propriety of an order of a subordinate Court. It is not denied that the High Court can examine any record of a subordinate Court to this extent, even though the particular order impugned is not open to appeal. This is conceded.

It is, however, seriously contended that though the legislature has unquestionably conferred this power on the High Court, it has not given the High Court power to interfere with any such order, even though it finds that such order is incorrect, illegal or improper. In other words, we are asked to hold that in such cases the High Court can send for the record and examine the order in question, but that once it has done so it must hold its hands and merely express the pious opinion that the order which it has examined is incorrect, or illegal, or improper. We refuse to believe that such was the intention of the legislature. On the contrary we are of opinion that very wide powers of revision were intended to be conferred on the High Courts under section 439 of the Code, and that it was with particular reference to non-appealable orders that the High Courts were empowered to act as Courts of Revision. As we read section 439 of the Code, the meaning of that section

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(1) (1900) I. L. R. 27 Cal. 126.

is that in any case to which section 435 or section 438 is applicable, the High Court can, with reference to any particular order (whether appealable or not), exercise all or any of the powers which, under section 423, an Appellate Court could exercise if that order happened to be one open to appeal, and that it was not intended by the legislature that the High Court's powers of revision were to be limited merely to orders from which an appeal would lie. Obviously the *main* idea underlying section 439 is that the High Court should be in a position to rectify cases of injustice or illegality in cases when the person affected is unable to appeal. But if the learned Government Advocate's contention is correct, not only is section 435 in many cases practically meaningless, but also the High Court's power to interfere is excluded from the very class of cases in which it is most important that the High Court should have the right to see that illegal or improper orders, which cannot be appealed from, are not allowed to work injustice. The construction which the learned Government Advocate would have us place on section 439 of the Code, would admittedly reduce this Court's power of revision to a very considerable extent indeed, and would, as the learned Advocate was forced to concede, make section 435 in many cases a mere absurdity. Before we can accept an argument which leads to such extraordinary, and we venture to say, curious results, we are justified in requiring strong authority in support of it. Mr. Petman could refer us, however, only to the *obiter dicta* of Prinsep and Hill, JJ., in the case above mentioned, and to the ruling of this Court reported as *Azim Khan v. Empress* (1) With the former case we have already dealt, and as regards the latter, we need say no more than that it is not in point inasmuch as in it the learned Judges were concerned with an interlocutory order in the course of the trial which in no way prejudiced the accused, and which in the event of his conviction could have been brought to the notice of the Appellate Court as a question requiring decision by the latter Court. We are by no means prepared to assent to the proposition that even with regard to such an order this Court had no power to interfere, and we note that in a case decided about the same time by the same learned Judges, *Ram Kala v. Ganda* (2), a rather different view of this Court's revisional powers was recognised.

(1) 45 P. R. 1885 Cr.

(2) 42 P. R. 1885 Cr.

On the other hand, there are a very large number of authorities in support of the views which we have expressed [see, *inter alia*, *Choa Lal Dass v. Anant Pershad Misser* <sup>(1)</sup>, *Jagat Chandra Mozumdar v. Queen-Empress* <sup>(2)</sup>, *Chandi Pershad v. Abdur Rahman* <sup>(3)</sup>, *Empress v. Luchman Singh* <sup>(4)</sup>, *Empress v. Clifton* <sup>(5)</sup>, *Queen-Empress v. Nageshappa Pai* <sup>(6)</sup>, *King-Emperor v. Sobha Ram* <sup>(7)</sup>], and therefore, upon the weight of authority, no less than upon general considerations, we hold that this Court has under section 43, full power to set aside, if it so thinks fit, the order of a Magistrate charging an accused person with an offence.

The next question is whether upon the facts of the present case we should exercise this power. This is a matter which has very considerably exercised our minds, especially as we unhesitatingly accept the principle that a High Court should be reluctant to interfere in cases such as the one before us. We are by no means satisfied that the action of the present accused was entirely beyond suspicion, and we are not prepared to say that the complainants had no ground for alleging sharp practices on his part. We give no opinion either way upon these points. We merely state that there are elements of suspicion in the case. But we have no hesitation whatever in asserting that in all such cases the proper tribunal to decide questions of this kind is the Civil Court, and that save for very exceptional reasons the decision of the Civil Court should be accepted as conclusive between the parties. In the present case the civil dispute between the complainants and the accused was a matter which could be adjudicated upon only by a Small Cause Court. It is, perhaps, a matter for regret that this was so, and it may be that if the dispute had been brought before an ordinary Civil Court the result of the civil litigation between the parties would have been different. Such might, or might not, have been the result, but the fact remains that the accused had to take his case to the Small Cause Court as that was the only Court that could entertain his claim. He has, in due course of law, satisfied that tribunal that his claim was a just one, and he has obtained a decree which is final and binding upon the parties. In the circumstances we think it would be anomalous to hold that it was open to the Criminal Courts to go behind the findings of the Civil Courts and to convict of cheating and

<sup>(1)</sup> (1898) I. L. R. 25 Cal. 233.

<sup>(2)</sup> (1899) I. L. R. 26 Cal. 786, 790.

<sup>(3)</sup> 1895 I. L. R. 22 Cal. 131.

<sup>(4)</sup> (1879) I. L. R. 2 All. 398.

<sup>(5)</sup> (1899) 19 All. W. N. 212.

<sup>(6)</sup> (1896) I. L. R. 23 Bom. 543.

<sup>(7)</sup> 18 P. R. 1904 Cr.



frand a person who, upon the very same facts, had succeeded in satisfying the Civil Court *upon the merits of the case* of the legality of his claim. Had the claim been decreed upon some technicality and apart from the merits the case might have been different, but in the case before us the Small Cause Court decided the question upon the evidence adduced before it, and so far as all Civil Courts are concerned its decision is final and binding. We think that this decision ought also to be accepted by the Criminal Courts and we, therefore, set aside the order of the Magistrate 1st class charging the accused, and we direct that he be discharged. We might add in conclusion that it is a very sound general principle that parties should not be encouraged to resort to the Criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a Civil Court. There is unfortunately a tendency on the part of persons who consider themselves aggrieved to rush to the Criminal Courts either for the purpose of obtaining at small cost to themselves a decision on matters which ought, in the ordinary course of things, to be adjudicated upon by the Civil Courts or of prejudicing the course of proceedings already instituted or about to be instituted, in a Civil Court by the other side. This tendency should be checked and Criminal Courts should be on their guard not to lend their aid in cases of this kind. In the present case the complainants sought the aid of the Criminal Courts before proceedings were taken by the accused in the Small Cause Court, but we are of opinion that the Magistrate would have exercised a wise discretion if he had, of his own motion, stayed proceedings in his Court pending the decision of the Civil Court, and had accepted that decision as finally settling the dispute between the parties. At the best, if he had thereafter proceeded with the trial, he would almost necessarily have felt bound to acquit the accused, for if a Civil Court had, upon the same facts, decided in the latter's favour, it would have been, if not technically wrong, at all events almost impossible for a Criminal Court to hold that there was no doubt whatever about the accused's guilt, and if there was a doubt, the accused would, of course, have been entitled to it.

*Revision allowed.*

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## No. 34.

*Before Hon. Mr. Justice Kensington.*

CROWN,

*Versus*

BAKHTAWAR—ACCUSED.

Criminal Revision No. 1234 of 1910.

*Youthful offender—Reformatory—Reformatory Schools Act, VIII of 1897—Appeal*

*Held*, that no order under the Reformatory Schools Act, 1897 can be made in respect of a youthful offender unless and until a definite sentence of imprisonment has been passed against him.

*Held*, also, that an order under the Act that the offender shall be sent to a reformatory school instead of undergoing his sentence does not deprive the offender of his ordinary right of appeal under the Criminal law.

*Case reported by S. Wilberforce, Esquire, Sessions Judge, Ambala Division, with his No. 2214 G. of 29th August 1910.*

Government Advocate for Crown.

Nemo for Accused.

The facts of this case are as follows :—

On the 18th of May 1910, Pali took out cattle of Fattu, Mali of Shadipur to graze. In the evening when he was taking them back he found a cow missing. On immediate search, Pali and Fattu came across the two accused Bakhtawar and Hamelu taking the cow away about half a mile off. On seeing them the accused ran off and left the cow. The accused were arrested on the following day.

The accused, on conviction by Major C. H. Buck, exercising the powers of a magistrate of the district in the Karnal District, was sentenced, by order, dated 2nd of June 1910, under section 379 of the Indian Penal Code, to detention at the Reformatory School, Delhi, until he reached the age of 18.

*The proceedings are forwarded for revision on the following grounds :—*

One Bakhtawar age 14 together with Hamelu a youth of 20 were convicted by a magistrate of an offence under section 379, Indian Penal Code for the theft of a cow. The proceedings were forwarded to the District Magistrate, Karnal, for measures to be taken against Bakhtawar under section 8 of Act VIII of 1897. The District Magistrate ordered that Bakhtawar should be detained at the Reformatory School, Delhi, until he reached the age of 18. No sentence of imprisonment was passed. As no sentence of imprisonment was passed Bakhtawar could not be sent to the Reformatory School "instead of undergoing such sen-

tence." The Crown applies for the legalisation of this defective order.

I doubt if this order of the District Magistrate was justifiable in view of the fact that the offence committed by Bakhtawar was his first offence and not a very serious one. In my opinion section 562 Criminal Procedure Code, might well have been applied to this case.

I therefore forward the proceedings under section 438, Criminal Procedure Code with the recommendation that the illegal order of the District Magistrate be quashed and that Bakhtawar be released on entering into a bond of Rs. 100 to appeal and receive sentence when called upon for one year and meanwhile to keep the peace and be of good behaviour. If this recommendation is not approved of I suggest that section 31 of Act VIII of 1897 be applied.

The order of the learned Judge was as follows :—

KENSINGTON, J.—The circumstances under which this case comes before the Chief Court for revision are sufficiently stated in the order of reference by the learned Sessions Judge. Proceedings for revision have been taken at the instance of the Crown as explained by the learned Government Advocate. 25th Nov. 1910.

The boy, Bakhtawar, aged 14, was convicted with his elder brother, Hamela, aged 20, by a *Tahsildar* Magistrate under section 379, Indian Penal Code, on a charge of cattle theft. The proceedings were submitted to the District Magistrate under section 349, Criminal Procedure Code. The District Magistrate sentenced the principal offender Hamela to whipping only, from which it may be inferred that he did not consider the offence one for which a sentence of imprisonment was required. As regards Bakhtawar he passed no sentence at all, but summarily directed that the boy be sent to the Reformatory till attaining the age of 18. It appears that the boy has since been an inmate of the Reformatory for some five months and that he is still there.

The District Magistrate's proceedings are irregular. He was bound to pass a definite sentence of imprisonment on Bakhtawar before making any order under Act VIII of 1897. His omission to do so not only invalidates the order sending the boy to the Reformatory but also constitutes a great injustice on the boy. No sentence having been passed the boy is deprived of his ordinary right of appeal under the criminal law. There



is nothing in Act VIII of 1897 which deprives a convict of such right, and all that is provided by section 16 of the Act is that where proceedings on trial are complete up to and including the stage of a sentence of imprisonment, there can be no interference with a subsequent order directing him to be sent to a reformatory. In this connection the ruling in *Ram Singh v. King Emperor* <sup>(1)</sup>, should be referred to. The Crown has asked that some order be now passed which shall legalize the proceedings, so as to justify the Reformatory authorities in retaining charge of the boy, if he is to be retained. I am unable to pass any such order, as it appears to me perfectly clear that even if the District Magistrate had passed a sentence in the case it would not have been one of imprisonment. As already shown imprisonment was considered unsuitable in the case of the principal offender, and would have been utterly unsuitable in the case of a boy of 14, who, whatever he did, must have been acting under the influence of his elder brother. I can scarcely believe that the District Magistrate when passing sentence would have ordered Bakhtawar to be imprisoned, and if he had done so, a sentence so improper under the circumstances of the case would almost certainly have been set aside either on appeal or revision. If the District Magistrate had proceeded according to law, he would apparently have at most sentenced Bakhtawar to whipping as a juvenile offender, just as he actually did sentence Hamelu, or preferably he would have dealt with the case under section 31 (1) (a) or (b) of the Reformatory Act.

The illegality of the District Magistrate's proceedings is so patent that even if Bakhtawar's conviction was proper, it would have been necessary to set them aside as not being covered by sections 8, 9 and 16 of the Reformatory Act.

The whole case is however now before me on revision and after examining the record I cannot agree that Bakhtawar's conviction is justified, whatever the conclusion may be as to Hamelu. The cow in question strayed while returning in the evening from grazing. There was an immediate search, and it was found half a mile from the village being driven by the two accused, who are Ja's of the village. Hamelu may possibly have intended theft, or more correctly criminal misappropriation, but there is no good reason for assuming that the younger brother shared his intentions. Bakhtawar would naturally,

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(1) 18 P. R. 1907, Cr.

being a mere child, do whatever his grown-up brother told him, without knowing what was meant, and his returning to the village at once after recovery of the cow indicates ignorance that he had done anything wrong. His conviction is set aside as improper on the scanty evidence available. It is directed that he be discharged from the Reformatory without delay, and restored to his parents or guardians in the village under suitable arrangements for his protection on the way.

*Revision allowed.*





# Financial Commissioner, Punjab.

## REVENUE JUDGMENTS.

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### No. 1.

*Before Hon. Mr. J. M. Douie, Financial Commissioner.*

ATTAR SINGH—(PLAINTIFF)—PETITIONER,

*Versus*

SANT SINGH AND LACHMAN SINGH—(DEFENDANTS)—  
RESPONDENTS.

Revision No. 40 of 1909-10.

*Succession—Pattidari jagirs in the Cis-Sutlej districts—Adopted son.*

*Held*, that the right of adoption has not been recognized in the case of *pattidari jagirs* in the Cis-Sutlej districts. Even in the case of major *jagirdars*, the right of adoption only exists by special grant, made in certain cases by the Government of India under rules, approved by His Majesty's Secretary of State in 1902.

*Petition for revision of the order of Colonel H. S. P. Davies, Commissioner of Jullundur, dated 13th September 1909.*

### ORDER.

THE FINANCIAL COMMISSIONER.—The orders passed are 30th Nov. 1909.  
correct. The right of adoption has not been recognized in the case of *pattidari jagirs* in the Cis-Sutlej districts. Even in the case of major *jagirdars*, the right of adoption only exists by special grant, made in certain cases by the Government of India under rules approved by His Majesty's Secretary of State in 1902. It may be noted that even among chiefs in the Cis-Sutlej territory it is doubtful whether a right to adopt was recognized. Sir Henry Lawrence and Sir Lepel Griffin (see *Rajas of the Punjab*, pages 225-226) both stated emphatically that no such right had ever existed. The right has been granted to the Phulkian Rajas by their *sanads*, but Lord Canning at first refused the request of the Rajas to be permitted to adopt on the ground that the concession would be an innovation on the custom, which had always prevailed among the chiefs of the Cis-Sutlej territory.

## No. 2.

*Before Hon. Mr. J. M. Douie, Financial Commissioner.*

IMAM DIN AND ANOTHER,—(DEFENDANTS)—PETITIONERS,

*Versus*

JIWAN AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Revision No. 22 of 1909-10.

*Revision, grounds for—Wrong decision as to res judicata—Financial Commissioner's discretion unfettered.*

*Held*, that a wrong decision as to *res judicata* is a good ground for revision, if it prevented a case being heard on the merits but the Financial Commissioner's discretion to exercise revisional powers in any case is quite unfettered, and the broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice.

*Petition for revision of the order of Colonel C. G. Parsons, Offg. Commissioner, Lahore Division, dated 14th August 1909.*

Daulat Ram, for petitioners.

Ganga Ram, for respondents.

The following judgment was delivered by

2nd April 1910.

THE FINANCIAL COMMISSIONER.—In this case we have to go back to the suit brought by the landlords against the tenants and decided by the Financial Commissioner on appeal by his order, dated 22nd November 1888. He held that the tenants were section 6 tenants and that the rent decreed against them should be "reduced to a rent calculated at the Government revenue *plus* cesses *plus* 12 annas per rupee as Government revenue." He added: "The exact rent will be worked out in each case." The suit was one for enhancement of rent. The land revenue was revised with effect from kharif 1889. The Settlement Officer should, in my opinion, have revised the rent under section 27 of the Tenancy Act, so as to bring it up to a rent equal to the new land revenue and cesses *plus* 12 annas per rupee of land revenue as *malikana*. The landlords by suit claimed that rate of rent. The Collector, Colonel Hutchinson, held that as the Financial Commissioner had given a decree for a particular amount of rent in each case, the calculation being based on the old revenue, they could only get their rent based on the new revenue as the result of bringing a fresh enhancement suit. That decision seems to me to have been erroneous, but the landlords would appear to have acquiesced in it till re-assessment operations were again started. In 1907

they applied to the Collector to have the entry as to rent in the record-of-rights corrected, and finally this was done. They then sued for rent at the new rate and got a decree from the Assistant Collector for one year's rent, though the tenants pleaded Colonel Hutchinson's judgment. The present Collector, Mr. King, accepted the tenant's appeal. He did not in his judgment specially refer to Colonel Hutchinson's decision, and the reasons for his own decision are not very clearly stated. The Commissioner Colonel Parsons, on appeal held that in the Settlement record of 1889 the rent should have been adjusted under the provisions of section 27 of the Tenancy Act. He declined to follow Colonel Hutchinson's decision, and restored the order of the Assistant Collector. He makes no specific mention of the question whether Colonel Hutchinson's decision that the only rent that could be decreed till the landlords brought a fresh enhancement suit made the subject-matter of the rent suit with which I am now dealing *res judicata*. My own view is that it did. The result is that I hold the Commissioner's order is on the merits quite right, but that he either overlooked the *res judicata* question or decided it wrongly. A wrong decision as to *res judicata* would naturally be a good ground for revision, if it prevented a case being heard on the merits. Exactly the reverse of this has happened here. My discretion to exercise revisional powers in any case is quite unfettered, and the broad principle to follow is to interfere only when a refusal to interfere would result in injustice or failure of justice. That is not the case here.

Application rejected.

Parties will pay their own costs in view of the circumstances of the case.

### No. 3.

Before the Hon. Mr. J. M. Douie, Financial Commissioner.

HAR LAL—(DEFENDANT)—APPLICANT,

*Versus*

MUSSAMMAT GOHRI—(DEFENDANT)	} RESPONDENTS.
AND	
SOCHETU—(PLAINTIFF)	

Revision No. 16 of 1909-10.

*Punjab Tenancy Act, XVI of 1887, sections 60 and 77 (3), (h)—Transfer of occupancy rights by widow—Suit by landlord for dispossession of vendee—Parties and limitation for such suit—Indian Limitation Act, XV of 1877, Article 144.*



*Held*, that in a suit against the vendor and vendee of a right of occupancy for dispossession of the vendee, if the suit succeeds, the decree is one for possession as against the vendee. The mere fact that the word "dispossession" is used in section 77 (3) (h) of the Punjab Tenancy Act, 1887, and the word "possession" in Article 144 of the Second Schedule of the Indian Limitation Act, 1877, makes no difference therefore when a landlord specifically sues for the dispossession of the vendee, Article 144 of the Indian Limitation Act, applies.

*Held*, also overruling *Prem Singh v. Jamit Singh* (1), that section 60 of the Punjab Tenancy Act, 1887, makes transfers under any section of Chapter V including section 59 (3), "voidable at the instance of the landlord" who alone can enforce his rights in the Revenue Court by bringing a suit under section 77 (3) (h) of the Punjab Tenancy Act, and that a reversioner of the widow's deceased husband cannot be added as a plaintiff as he is not a landlord. He has his remedy in a Civil Court if the landlord takes no action or the widow abandons the land.

*Application for revision from the order of the Commissioner, Jullundar Division, dated the 28th September, 1909.*

Amrit Lal Roy, for petitioner

Duni Chand, for respondent.

#### ORDER.

18th April 1910.

THE FINANCIAL COMMISSIONER.—The suit was brought by Sochetu, one of the landlords, to dispossess defendant II, Har Lal, vendee of occupancy rights of Mussammat Gauhri, who had a childless widow's life interest in the holding \* \* \* \*. In the Court of the Assistant Collector it was held that the claim was barred by limitation under Article 120 of Schedule II of the Limitation Act. \* \* \* \*. Suchetu, the landlord, appealed, and the Collector accepted his appeal. The Collector held—

(a) \* \* \* \* \*

(b) that the limitation was 12 years under Article 144 ;

(c) \* \* \* \* \*

Har Lal appealed to Commissioner alleging (a) that the suit was barred under Article 120 ;

(b) \* \* \* \* \*

(c) \* \* \* \* \*

The Commissioner held that \* \* \* \* \* the suit was not barred by limitation.

I shall first deal with the question of the period of limitation applicable to a suit for dispossession of a vendee of a right of occupancy under section 6 of the Tenancy Act, when the sale is made without the written consent of the landlord.

Among the suits reserved for Revenue Courts in section 77 (3) of the Tenancy Act are :

(h) "Suits by a landlord to set aside a transfer made of a right of occupancy or to dispossess a person to whom such a transfer has been made, or for both purposes.

The landlord has his choice between three kinds of suits, and in the present case his suit was for the dispossession of the vendee. The applicant's counsel quoted *Ram Chand v. Muhammad Khan* <sup>(1)</sup> and *Jiwan Singh v. Maharaja Jaggat Singh* <sup>(2)</sup>. The former relates to a suit for a declaration that a sale of occupancy right was void. There is an *obiter dictum* in the second.

"I may here note that the period of limitation for bringing a suit to void a voidable transfer is 6 years (see *Ram Chand v. Muhammad Khan* <sup>(1)</sup>).

The Respondents' counsel has quoted *Ghulam Jilani Khan, v. Muhammad Hussan* <sup>(3)</sup>, (probably *Sultan v. Ilahi Bakhsh* <sup>(4)</sup> is meant), *Ilahiya v. Ganda Singh* <sup>(5)</sup>, *Radu v. Harnam Singh* <sup>(6)</sup>, *Baz Khan v. Sultan Malik* <sup>(7)</sup>.

It was argued for applicant that a suit for dispossession was quite different from a suit for possession, and that suit was one "for which no period of limitation is provided elsewhere in this schedule," and therefore Article 120 applies. In a suit against the vendor and vendee of a right of occupancy for dispossession of the vendee the decree, as in the present case, if the suit succeeds, is one for possession as against the vendee. The mere fact that the word "dispossession" is used in section 77 (3) (h) of the Tenancy Act, and the word "possession" in Article 144 of Schedule II of the Limitation Act, makes no manner of difference. The landlord could, if he pleased, have sued for a declaration that the deed was invalid and refrained from any action to oust the vendee during the vendor's life time. But he sued specifically for the dispossession of the vendee. Article 144 applies and the period of limitation is 12 years.

\* \* \* \* \*

(1) 135 P. R., 1888.

(2) 1 P. R., 1898, Rev.

(3) 74 P. R., 1894, F. B.

(4) 73 P. R., 1894 F. B.

(5) 116 P. R., 1890, F. B.

(6) 18 P. R., 1895, F. B.

(7) 43 P. R., 1901.

In *Pareem Singh v. Jamiat Singh* (1), Sir Lewis Tapper \* \* \* held, no doubt quite truly, that the provision in section 59 (3) of the Tenancy Act was framed mainly in the interests of the reversioners. He held further that "in order to give full effect to section 59 (3) in all cases brought by landlords for possession by cancellation of a transfer of a right of occupancy made by a widow the reversioners of her deceased husband, if any, should be summoned, and, if they consent, should be made plaintiffs, for in the event of the transfer being cancelled the reversioners are entitled to possession, and the landlords only if the former waive their claim or there are no reversioners. To hold that the landlords are so entitled without regard to the claims of reversioners would be to allow widows in collusion with their landlords to make a spurious alienation to some of the latter for the purpose of enabling the whole body to extinguish the occupancy right." It seems to me that this finding does not properly distinguish between the rights of landlords and the rights of reversioners. Section 60 of the Tenancy Act makes transfers under any section of Chapter V including section 59 (3) "voidable at the instance of the landlord." The landlord enforces his right in the Revenue Court by bringing a suit under section 77 (3) (h) of the Tenancy Act, I cannot see how a reversioner can possibly be added as a plaintiff. He is not a landlord, and only landlords can bring suits under section 77 (3) (h). He has his own remedy of course. If the landlord takes no action the reversioner can sue the widow and the transferee in the Civil Court to have the transaction cancelled. *Ishar Singh v. Lal Singh* (2).

If the widow is out of possession he can also sue her and the transferee in the Civil Court for possession of the land on the ground that the widow has "abandoned" the land (section 59 (1) (b) and that the transferee has no right to possession. If the landlord has by suit in the Revenue Court got possession of the land as against the transferee and the widow makes no effort to regain possession, he can sue the landlord for possession on the ground that the widow has abandoned the land and that on her abandonment the reversioner is entitled to possession, \* \* \* *Didaru v. Banna* (3), does not bar the suit, for the law absolutely forbids transfers by widows.

\* \* \* \* \*

(1) 4 P. R. 1900, Rev.

(2) 39 P. R. 1898.

(3) 31 P. R. 1896, F. B.



## No. 4.

*Before Hon. Mr. J. M. Dowie, Financial Commissioner.*

GIRDHARI RAM—(DECREE-HOLDER)—PETITIONER,

*Versus*

MEHR KHAN AND ANOTHER—(JUDGMENT-DEBTOR)—  
RESPONDENT.

Revenue Revision No. 207 of 1909-10.

*Civil Procedure Code, Act V of 1908—Sale of land in execution of decree—Sanction of Commissioner.*

*Held*, that the special rule framed under the Civil Procedure Code of 1882, section 327, having become inoperative since the enactment of Civil Procedure Code, 1908, the sanction of the Commissioner of the division is no longer required, as a condition precedent to the sale in execution of decree of land applied to agriculture or pastoral purposes.

*Revision from the order of C. J. Halifax, Esquire, officiating Commissioner, Rawalpindi Division, dated the 6th June 1909.*

## ORDER.

THE FINANCIAL COMMISSIONER.—The special rule under which the Collector reported the case to the Commissioner was one in force under the 2nd clause of section 327 of the Civil Procedure Code of 1882. That section was not re-enacted in the Civil Procedure Code of 1908, which came into force on 1st January 1909, from which date the special rule became inoperative. The sanction of the Commissioner of the division is no longer required as a condition precedent to the sale in execution of decree of land applied to agriculture or pastoral purposes. Case returned to Commissioner.

## No. 5.

*Before Hon. Mr. J. M. Dowie, Financial Commissioner.*

RAJA RAM—(JUDGMENT-DEBTOR)—PETITIONER,

*Versus*

DURGA DUT—(DECREE-HOLDER).—RESPONDENT.

Revision No. 27 of 1909-10.

*Execution of decree—Attachment of land by Civil Court—Submission of record to Collector for intervention—No appeal if Collector refuses.*

*Held* that, where in execution of a decree after attaching agricultural land, a Civil Court sends the record to the Collector it amounts to an order enquiring from the Collector whether he wishes to intervene under section 1 of the Civil Procedure Code, Act V of 1908, and that no appeal lies against the order of the Collector if he refuses to intervene.

*Petition for revision of the order of A. Meredith, Esquire, Commissioner, Delhi Division, dated the 14th June 1909.*

Obbard, for petitioner.

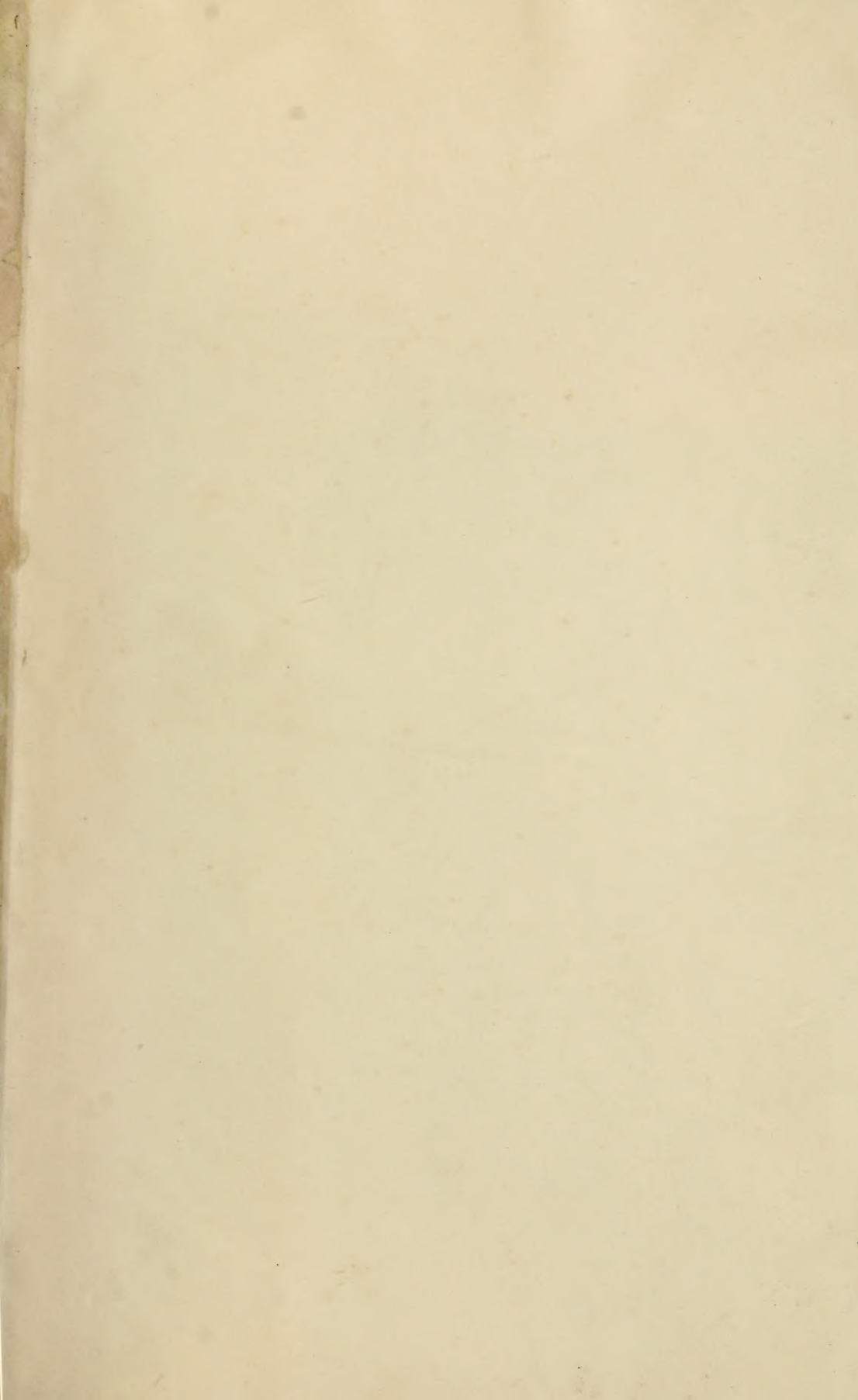
Jai Lal, for respondent.

The order of the learned Financial Commissioner was as follows:—

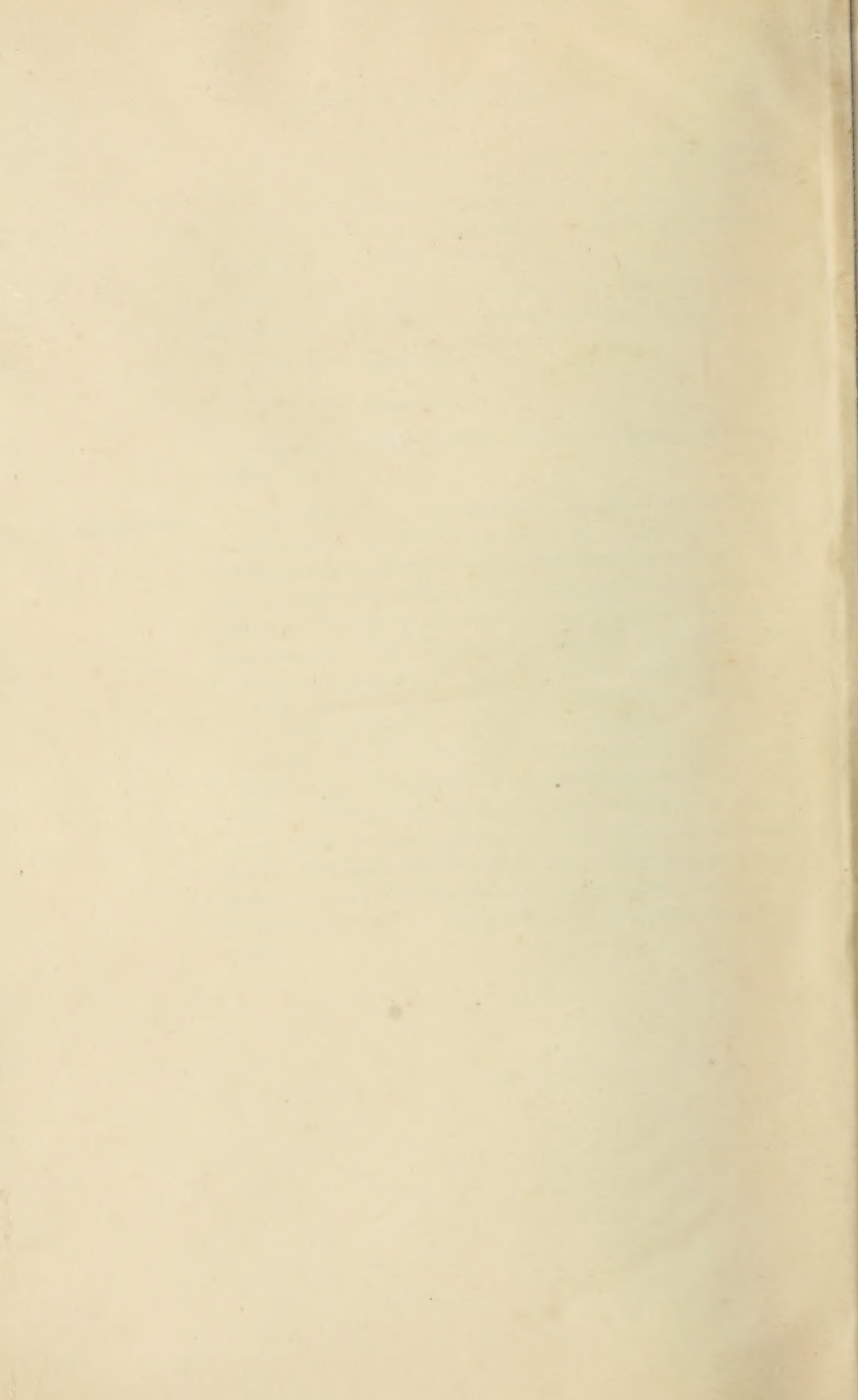
26th May 1910.

THE FINANCIAL COMMISSIONER.—The Commissioner's order cannot stand. The Civil Court by order, dated 28th August 1908 sent the file to the Collector after attaching the land. That must be taken as an order enquiring from the Collector whether he wished to intervene (paragraph 3 on page 330 of Land Administration Manual). The Collector by order dated 19th October 1908 declined to intervene. There is no appeal against that order. Had the Collector informed the Civil Court that he desired to intervene and the Civil Court had decided to authorise him to do so (paragraph 5 on page 330 of Land Administration Manual), then any orders passed subsequently by the Collector in exercise of the authority conferred by the Court would have been subject to appeal under the rule published in Punjab Government Notification No. 186, dated 23rd September 1895, and reproduced in paragraph 7 on page 333 of the Land Administration Manual. The Commissioner had no jurisdiction and his order must be set aside.

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